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# REPRESENTING THE UNITED STATES GOVERNMENT: RECONCEIVING THE FEDERAL PROSECUTOR'S ROLE THROUGH A HISTORICAL LENS

SCOTT INGRAM\*

## ABSTRACT

*For nearly 100 years courts and legal scholars have held prosecutors to the “justice” standard, meaning that the prosecutor’s first duty is to ensure that justice is done. With this command, prosecutors have increased their discretion. The modern prosecutor’s power is unrivaled in the criminal justice system. Judges and defense attorneys have ceded some of their power to prosecutors. The prosecutor’s power has led a host of commentators to critique prosecutorial use of power for a variety of reasons. Rather than add to this voluminous literature by defending or critiquing prosecutorial power, this Article challenges the underlying assumption of prosecutorial power: that prosecutors pursue justice. It argues that prosecutors should be freed from the “justice” standard and, instead, at least on the federal level, be responsive only to clearly articulated executive policy.*

*To demonstrate how prosecutors would function in a system where they are not required to do justice, this article examines criminal enforcement of the federal government’s neutrality policy in 1793. This was the new government’s first organized foray into criminal prosecution. President George Washington and his administration proceeded based on national interest and expected their attorneys, the United States District Attorneys, to adhere and enforce the national policy. The Article begins by establishing that federal prosecutors represent the government and not the people’s interests. It then defines how the people are represented in a republican government with a particular focus on how members of Washington’s administration interpreted the concept of representation. It then describes how Washington and his administration enforced neutrality through criminal prosecution. Against this backdrop, the final section argues that our modern federal prosecutorial problems can be resolved if we reconceive the federal prosecutor’s function as a policy enforcer rather than a quasi-judicial figure.*

## I. INTRODUCTION

Attorneys represent clients and advocate their clients’ legal positions. Prosecuting attorneys, like other attorneys, have clients. Prosecutors, depending on whether they are state or federal prosecutors, represent their state or the United States. Or the government. Or the

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people. Perhaps they represent the victim or the police. Maybe they represent justice. Herein lies the prosecutor's dilemma. Whom does the prosecutor represent?

This is not simply an academic question. Prosecutors, unlike other attorneys, do not have living clients who provide instructions.<sup>1</sup> They do not have to report to a client about the case's progress. They do not have to concern themselves with the possibility that the client may choose another attorney if the attorney does not meet the client's expectations. They do not have to bill their time. Instead, prosecutors enjoy tremendous discretion. They decide whom to charge. They decide what to charge. They decide to dismiss a case. They decide to settle cases without consulting anyone.

Scholars from a variety of disciplines have endeavored to understand and explain why prosecutors have so much power and how prosecutors exercise it.<sup>2</sup> Some have proposed ideas to restrain this power.<sup>3</sup> This Article addresses the problem of prosecutorial discretion generally and client identification specifically by explaining what it means to represent the United States government. As the government's attorney, the prosecutor must represent and advocate the government's interests. However, the government's interests in a criminal case are not clear. The United States government originates from the people. The people primarily speak through elections. They also express their voice through actions of popular sovereignty including social media, public

1. One might argue that some corporate attorneys do not have living clients. However, corporate attorneys will still meet with corporate CEOs or others who have responsibility for the corporation. States and the United States do not have comparable people. The closest that come are the Governor or President. Neither of these officials meet with prosecutors regularly and certainly do not call upon them for advice, in the case of Governors and local prosecutors.

2. Most recently legal scholars have led the inquiry into prosecutorial discretion while using social science methods. See e.g., Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005); Ronald F. Wright, Kay L. Levine & Marc L. Miller, *The Many Faces of Prosecution*, 1 STAN. J. OF CRIM. L. & POL'Y 27 (2014). Others who have studied prosecutorial discretion include criminologists, psychologists, sociologists, political scientists, economists, and historians. See e.g., Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y R. 461 (2005); William C. Thompson & Edward L. Schumann, *Interpretation of Statistical Evidence in Criminal Trials: The Prosecutor's Fallacy and the Defense Attorney's Fallacy*, 11 L. & HUM. BEHAV. 167 (1987); Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBLEMS 4 (1979); Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices*, 23 JUST. SYS. J. 271 (2002); Edward L. Glaeser, Daniel P. Kessler & Anne Morrison Piehl, *What Do Prosecutors Maximize?: An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259 (2000); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 THE AM. J. OF LEGAL HIST. 43 (1995).

3. See e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006); ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); Richard Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009).

opinion polls, and organized or spontaneous protests. In criminal justice matters, the people speak through jury service. Yet the government does not always respond as some people desire. Sometimes the government takes a position diametrically opposed to the majority's desires. Therefore, if the prosecutor represents the United States government, and the government originates with the people, how can the prosecutor choose between these opposing positions?

The accepted answer is that prosecutors must seek justice above all else. However, this vague standard provides little guidance for day-to-day decisions.<sup>4</sup> Instead, this Article asserts that prosecutors should eschew the justice standard and, instead, adhere to clearly enunciated presidential policy.

The starting point for this assertion is the attorney-client relationship. The unique nature of the prosecutor's attorney-client relationship distinguishes prosecutors from all other attorneys.<sup>5</sup> By identifying

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4. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About A Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635, 637–38 (2006); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 256 (1993); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. OF CRIM. L. 197, 227 (1988).

5. ABA Model Rule of Professional Responsibility 3.8 defines the special responsibilities. The prosecutor is the only attorney that has "special responsibilities." Rule 3.8 states: The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information; (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule. (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor's jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit. (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction. Rule 3.8: Spe-

not only the prosecutor's client but also identifying that client's interests, we can provide workable boundaries for prosecutorial discretion.

At first reading, disconnecting prosecutors and justice may sound absurd. It seems out of place in today's prosecutorial culture. The "pursuit of justice" is a bedrock principle for prosecutors.<sup>6</sup> However, examining the origins of federal criminal prosecution reveals the benefits gained by disconnecting prosecutors from the requirement that they "seek justice." Among these benefits is the possibility that we can return to a better balance of power between prosecutors, judges, defense attorneys, and, especially, juries.

One important distinction must be made prior to proceeding. The United States federal government system creates two (and arguably three) prosecutor categories. Federal prosecutors (i.e. United States attorneys and Justice Department lawyers) represent the United States as a whole and prosecute violations of federal criminal law.<sup>7</sup> State prosecutors represent their specific state and prosecute violations of state criminal law.<sup>8</sup> The third group represents a local government such as a city or town and prosecutes violations of local ordinances.<sup>9</sup> Of these three groups, state prosecutors handle the majority of criminal cases.<sup>10</sup> This Article addresses only federal prosecutors for two reasons. First, federal prosecutors have more discretion when making charging decisions than either of the other two groups because the federal criminal code employs very broad statutory language.<sup>11</sup> A wide variety of conduct falls within a wide variety of statutes. State and local prosecutors, conversely, have simpler and narrower criminal statutes. State and local

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cial Responsibilities of a Prosecutor, MODEL RULES OF PROF'L CONDUCT r. 38 (AM. BAR ASS'N 1983).

6. Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 39–47 (2009) (discussing the "minister of justice" model for prosecutors).

7. *About DOJ*, DEP'T OF JUST. (2015), <http://www.justice.gov/about> (last visited Sept. 18, 2015).

8. This is a generalized statement. Different states style their criminal cases differently. For example, New York labels its cases as "The People." See e.g., *The People v. Howard S. Wright*, 37 N.E.3d 1127 (N.Y. 2015). Pennsylvania styles its cases as "Commonwealth of Pennsylvania." See e.g., *Commonwealth v. Treiber*, 121 A.3d 345 (Pa. 2015). Maryland styles its cases as "State of Maryland." See e.g., *State v. Sutro Waine*, 122 A.3d 294 (Md. 2015).

9. For example, in St. Louis, Missouri, the City Counselor's office handles all traffic and ordinance violations, among other legal matters, for the City. CITY COUNSELOR'S OFFICE, <https://www.stlouis-mo.gov/government/departments/counselor/> (last visited Sept. 18, 2015).

10. According to the U.S. Supreme Court, there were slightly more than 80,000 criminal defendants sentenced in federal court during Fiscal Year 2013. GLENN R. SCHMITT & ELIZABETH JONES, U.S. SENTENCING COMMISSION, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2013 (2014). By comparison, in all five boroughs of New York City, the courts disposed of over 315,000 cases in 2015. *Caseload Statistics 2015*, N.Y. COURTS. GOV. (2015), <http://www.nycourts.gov/COURTS/nyc/criminal/caseloadstatistics.shtml> (last visited Nov. 22, 2016).

11. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 761 (1999) (asserting that Congress has "eschewed legislative specificity" to an "extraordinary extent" in criminal statutes).

prosecutors also have more scrutiny placed on their decisions.<sup>12</sup> As (usually) elected officials,<sup>13</sup> they will have significant public relations problems if they decide not to prosecute armed robberies. Federal prosecutors will not have the same outcry if they refuse to prosecute people selling ginseng dug out of season.<sup>14</sup> Second, federal prosecutors, in terms of historical study, have a formal starting point. The First Congress created them in the 1789 Judiciary Act.<sup>15</sup> Observing this starting point gives a clear view of how the first federal prosecutors performed their role.<sup>16</sup> The precedent setting activity can be identified. Conversely, the origins of state prosecutors are murky, dating to colonial times.<sup>17</sup> Different colonies had different legal systems and a single starting point for state and local prosecutors cannot be found.<sup>18</sup>

Examining the federal prosecutor's origins also adds depth to our modern understanding of the position in a variety of ways.<sup>19</sup> Today's federal prosecutors do not work in a historical vacuum. If this is doubted, one can examine the Southern District of New York United States Attorney's Office. New prosecutors are indoctrinated into the office's history and unique reputation.<sup>20</sup> The early work of federal prosecutors also provides a clear view of their role perception and duties. There is less work and few bureaucratic layers. As a result, we see direct interaction between the people, the government, and their attorneys. A historical perspective also provides insight into the role's

12. Stuart A. Scheingold & Lynne A. Gressett, *Policy, Politics and the Criminal Courts*, 12 L. & SOC. INQUIRY 461, 477–78 (1987).

13. At least Connecticut, New Jersey, and Delaware do not elect their local prosecutors. See *Frequently Asked Questions*, STATE OF CONN.: DIVISION OF CRIM. JUST. (2016), <http://www.ct.gov/csao/cwp/view.asp?q=285526> (last visited Nov. 4, 2016); N.J. CONST. art. VII, § 2; *About the Office*, DELAWARE DEPARTMENT OF JUSTICE (2016), <http://attorneygeneral.delaware.gov/executive/about.shtml> (last visited Nov. 4, 2016).

14. 16 U.S.C. § 1540 (2016).

15. 1 Stat. 73 (1789) (establishing the United States District Attorney and the Attorney General).

16. I recognize that any picture developed through historical inquiry is inevitably incomplete. As my research has shown, the surviving records are certainly incomplete. Also, especially in cases such as the one discussed in this Article, there was much more than written communication. However, the conversations, with the exception of Jefferson's notes about them, do not survive the moment.

17. JOAN JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 6 (1980).

18. *Id.* at 12–15; LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 17–19 (3d ed. 2005).

19. Much of the historical research about federal prosecutors is tangential to a larger point. For example following the United States Supreme Court's decision in the independent counsel case of *Morrison v. Olson*, several scholars wrote about the beginnings of federal criminal prosecution when attempting to answer whether law enforcement was a "core executive function" of the president. See e.g., Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L. J. 1069 (1990); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. R. 275 (1989); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L. J. 561 (1989).

20. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L. J. 607, 610–12 (1998) (discussing in the introduction his entry into the Southern District of New York's U.S. Attorney's Office).

origins. Discussing prosecutors as they function today drops us into the middle of the story. We have no context or sense of how the characters arrived in their roles. Examining their history, and specifically their origins as this Article does, provides the necessary context and gives lessons for today.<sup>21</sup>

This Article proceeds in four parts. Part one identifies the United States government as the federal prosecutor's client from among potential client identities based upon the text of the 1789 Judiciary Act. The second part explores what it means to represent the United States government by examining what representation meant to those who served in the federal government following the Constitution's ratification. Representation defines the relationship between the people and the government and answers questions relating to how people express their opinions to the government and how the government speaks to the people. If prosecutors represent the United States government, we need to understand what representation means when talking about a republican form of government. With this understanding, we see how "the people," the federal government, and the government's attorneys are not closely connected and that federal prosecutors are insulated from public demands. Section three moves from the theoretical to the practical by looking at how the people and the government communicated in a specific situation: the 1793 neutrality crisis and the resulting criminal prosecution of Gideon Henfield. Throughout the case, the people and the government communicated through symbolic actions. More importantly, we see how the United States District Attorney represents the government, not the people. The final section takes the lessons learned from the case and applies them to prosecutors today. Ultimately, this Article concludes that prosecutors fulfill their representative function by zealously advocating the United States government's policy positions, not by "seeking justice."

## II. IDENTIFYING THE PROSECUTOR'S CLIENT

There are many possible answers to whom the prosecutor represents.<sup>22</sup> These include the public, victims, law enforcement agencies, United States Attorneys, the Attorney General, the President, and the United States government.<sup>23</sup> Identifying the prosecutor's client makes a practical difference when evaluating prosecutorial decision-making. A prosecutor who perceives the victim as a client might be less likely to dismiss a case than a prosecutor who perceives a law enforcement agency as a client. The victim might demand retribution through the

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21. One thing not intended by this perspective is to argue for an originalist perspective. This Article does not argue that because the government began this way that we must return to it. Today's federal government is much different than it was in the 1790s and we cannot go back to it. However, there are approaches and perspectives from this time that give us insight into how federal prosecutors should use their discretion today.

22. James R. Harvey, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1570 (1996).

23. *Id.*

courts, but law enforcement will see the matter as just another case.<sup>24</sup> A federal prosecutor who perceives a United States attorney as a client may be less likely to follow Department of Justice policies than one who sees the Attorney General as the client.<sup>25</sup> The assistant United States attorney who perceives the United States attorney as a client will follow local concerns more than the national concerns the Attorney General represents.

The federal prosecutor's origins demonstrate that they represent the United States government. Prior to independence, each colony operated its own unique judicial system despite all deriving from the British common law system.<sup>26</sup> While not all were similarly effective, they shared certain characteristics.<sup>27</sup> Generally, justice was administered by private parties.<sup>28</sup> Crime victims presented their own cases to justices of the peace or grand juries.<sup>29</sup> If the case progressed further, the victim would have had to hire an attorney to present the case. Not everyone could afford an attorney. In some places, this meant the attorney that handled the court's clerical duties would present the case.<sup>30</sup> This attorney, who was often freshly admitted to the bar, would also present the evidence in cases where the grand jury acted on its own information.<sup>31</sup> In this capacity, the public prosecutor served more as a judicial figure than an executive one.<sup>32</sup>

Following independence, the colonial systems continued as state court systems. While debating the Constitution, however, questions arose about the need for and power of federal courts.<sup>33</sup> During the years preceding the revolution, the British used courts to control the

24. See generally Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

25. H.W. Perry, Jr., *United States Attorneys—Whom Shall They Serve?*, 61 L. & CONTEMP. PROBS. 129, 135 (1998).

26. Douglas Greenberg, *The Effectiveness of Law Enforcement in Eighteenth-Century New York*, in 1 CRIME & JUST. IN AM. HIST. 264 (Erik H. Monkkonen ed., 1991) [hereinafter *Law-Enforcement in Eighteenth-Century New York*]; Douglas Greenberg, *Crime, Law Enforcement and Social Control in Colonial America*, in 1 CRIME & JUST. IN AM. HIST. 231, 262 (Erik H. Monkkonen ed., 1991); David H. Flaherty, *Crime and Social Control in Provincial Massachusetts*, 1 CRIME & JUST. IN AM. HIST. 105, 117 (Erik H. Monkkonen ed., 1991). There were also Dutch and French influences on the American system. See JACOBY, *supra* note 17, at 3.

27. Compare Flaherty, *supra* note 26, with *Law Enforcement in Eighteenth Century New York*, *supra* note 26.

28. See JACOBY, *supra* note 17, at 18–19; John A.J. Ward, *Private Prosecution: The Entrenched Anomaly*, 50 N.C. L. REV. 1171 (1972); Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754 (1975). These articles argue against the use of private prosecution. For the nineteenth century history, see Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney and American Legal History*, 30 CRIME & DELINQUENCY 568 (1984); Ireland, *supra* note 2.

29. Steinberg, *supra* note 28, at 571.

30. JACOBY, *supra* note 17, at 14–17.

31. See Ireland, *supra* note 2, at 43–44.

32. JACOBY, *supra* note 17, at 19–20.

33. WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789* 5 (Wythe Holt & L.H. LaRue eds., 1990); WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* (Herbert A. Johnson ed., 1995) [hereinafter *THE SUPREME COURT IN THE EARLY REPUBLIC*]; Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation*



colonists and force compliance with perceived unjust laws.<sup>34</sup> When the British prosecuted colonists for resisting these laws, colonial juries often refused to indict or convict.<sup>35</sup> This experience caused many to fear strong judicial control and prefer juries in all criminal cases.<sup>36</sup> Unable to reconcile competing views, the Constitutional Convention settled on a federal Supreme Court, with limited jurisdiction, and left the creation of inferior federal courts to the First Congress.<sup>37</sup>

The First Congress inherited the federal court problem and made establishing lower federal courts one of its first priorities.<sup>38</sup> Throughout the summer of 1789, Congress crafted the Judiciary Act. In addition to establishing a system of inferior federal courts, Congress created two new attorney positions. The first was United States District Attorneys.<sup>39</sup> Each federal court district—which the legislation created to correspond with the boundaries of each state—had its own attorney. The attorney had to be learned in the law and was to represent the United States in every civil or criminal case in which it had an interest arising in the federal courts for that district.<sup>40</sup> The second was the Attorney General.<sup>41</sup> Also to be learned in the law, the Attorney General was to represent the United States in the Supreme Court and give legal opinions to the executive departments.<sup>42</sup> Initially, the Senate gave the Supreme Court power to appoint the Attorney General.<sup>43</sup> Later in the legislative process, Congress made the Attorney General an executive

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tion, in *ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789* 13 (Maeva Marcus ed., 1992).

34. Jon P. McClanahan, *The 'True' Right to Trial by Jury: The Founders' Formulation and its Demise*, 111 W. VA. L. REV. 791, 799 (2008).

35. *Id.*

36. RITZ, *supra* note 33, at 5; THE SUPREME COURT IN THE EARLY REPUBLIC, *supra* note 33, at 32; Marcus & Wexler, *supra* note 33.

37. U.S. CONST., art. III, § 2-3; see also JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAWMAKERS* 108 (1950) (stating that all agreed a Supreme Court was necessary to protect federal interests and asserting that many opposed giving Congress the power to create inferior federal courts).

38. David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. OF CHI. L. SCH. ROUNDTABLE 161, 208 (1995).

39. Judiciary Act, 1 Stat. 73, § 35.

40. *Id.* ("And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden.").

41. *Id.* ("And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion on questions of law when requested by the President of the United States, or when requested of any of the heads of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.").

42. *Id.*

43. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 108-09 (1923). There is also evidence that an initial draft made the United States District Attorneys appointed by a federal district judge. *Id.* at 109 (quoting a

appointment with the Senate's advice and consent.<sup>44</sup> This structure mirrored the state prosecutorial structure to an extent. By this time, all states had attorneys general, and many used public prosecutors.<sup>45</sup> However, these positions were perceived as judicial offices, not as attorneys representing the government.<sup>46</sup> The Judiciary Act, with its express statement about representation, moved the federal attorneys into the executive branch.

Within days of the Judiciary Act becoming law, President George Washington appointed the Attorney General and many of the United States District Attorneys.<sup>47</sup> The Senate quickly approved them.<sup>48</sup>

Other than the qualifications and broadly described duties, the Judiciary Act provided little guidance to these new federal attorneys. Per its language, the Judiciary Act made the office holder the "attorney for the United States in such district."<sup>49</sup> This language makes clear that the attorney represents the United States. However, is it the United States or the United States government? Are they two different things? Do they have different interests?

Ideally, the United States and its government have the same interests. What this means precisely is the subject of the next Section. Representing the United States, however, excludes others from being the federal prosecutor's client because representing any other entity could create a conflict of interest, something ethics rules forbid attorneys from accepting.<sup>50</sup> First, neither the Attorney General, nor the United States attorney for the district is the client. They, like all other federal prosecutors, represent the United States. A more difficult question occurs when the President is the client.<sup>51</sup> It is clear that federal prosecutors do not represent the individual filling the President's role. Should the President need personal representation, the President is responsible for retaining counsel.<sup>52</sup> However, the individual holds an office. Could the office of the President be the client? As discussed

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letter from future United States District Attorney Christopher Gore to Senator Rufus King).

44. *Id.* at 109.

45. JACOBY, *supra* note 17, at 19–20.

46. Bloch, *supra* note 19, at 571–74.

47. Letter from George Washington to the United States Senate (Sept. 24, 1789), in *THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES* (Dorothy Twohig ed. 1993). The next day he filled New York and New Jersey as well as Attorney General Randolph. Letter from George Washington to the United States Senate (Sept. 25, 1789), in *THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES* (Dorothy Twohig ed., 1993).

48. S. JOURNAL, 1ST CONG., 1ST SESS. 29–33 (1789).

49. 1 Stat. 73, § 35.

50. MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 1983).

51. See Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2004).

52. The most poignant example of this is the legal troubles that hampered the Clinton administration throughout its two terms. The legal problems resulted in Clinton's eventual trial for impeachment before the Senate. At the impeachment trial, he was represented by deputy White House Counsel Cheryl Mills. However, during the entire scandal, Clinton also employed a personal attorney, Robert S. Bettett. See Eric Fuchs, *Where Are They Now: The Stars of the Clinton Impeachment Scandal*, BUSINESS INSIDER (May 2, 2014), <http://www.businessinsider.com/where-are-clinton-impeachment-lawyers-now-2014-4>.

below, the President's office represents the entire United States.<sup>53</sup> The President, theoretically, embodies the people's will. Initially, there was little difference between the United States and the President.<sup>54</sup> The President was presumed to act in the national interest. Historical practice, however, has demonstrated this is not always the case.<sup>55</sup> At times, the President has stood in opposition to the government.<sup>56</sup> This division led to the increased importance of the White House counsel.<sup>57</sup> This person represents the office of the President.<sup>58</sup>

Due to the divide between the office of the President and the United States, for federal prosecutors to represent the United States, there must be a clear dividing point between the office of the President and United States. That divide is policy. Those entering the presidency do so with a policy agenda.<sup>59</sup> Accomplishing the agenda requires law enforcement decisions. Often this requires certain laws to be enforced more vigorously than others.<sup>60</sup> As the government's lawyers, federal prosecutors are responsible for enforcement. Sometimes new or developing situations arise that require presidential action. Administrations must adopt policies to address these new or developing situations. At other times, enforcement of existing laws must be more stringent. In order to represent the United States, federal prosecutors must enforce these laws.

Enforcing policy, and only enforcing policy, differs from representing the President as an office. Most importantly, the difference emerges when the President is at odds with the government. This situation arises in criminal matters when the President, or a high-ranking administration official, violates the law.<sup>61</sup> When that occurs, federal prosecutors prosecute the executive branch.<sup>62</sup> This does not, however, require that they no longer enforce administration policies.

Prosecutors, like all other attorneys, have a client. Today's prosecutorial environment makes the identity of the prosecutor's client

53. See *infra* notes 114–17 and accompanying text.

54. DAVID HEIDLER & JEANNE T. HEIDLER, *WASHINGTON'S CIRCLE: THE CREATION OF THE PRESIDENT* (2015) (ebook); GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 131 (Wilson Carey McWilliams & Lance Banning eds., 1993).

55. See Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 L. & CONTEMP. PROBS. 63 (1993).

56. *Id.*

57. *Id.*

58. Bruce Ackerman, *Abolish the White House Counsel: And the Office of Legal Counsel, too, while we're at it*, SLATE (Apr. 22, 2009), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/04/abolish\\_the\\_white\\_house\\_counsel.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/04/abolish_the_white_house_counsel.single.html); Rabkin, *supra* note 55, at 63–65.

59. Willard M. Oliver, *The Pied Piper of Crime in America: An Analysis of the Presidents' and Public's Agenda on Crime*, 13 CRIM. JUST. POL'Y REV. 139, 140–41 (2002).

60. See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013).

61. The most recent example of this are the allegations of torture permitted by the G.W. Bush administration. Despite calls for prosecution, the Department of Justice decided not to pursue criminal prosecution. See Fran Quigley, *Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch*, 20 CORNELL J.L. & PUB. POL'Y 271 (2010).

62. Rabkin, *supra* note 55, at 76–77.

ambiguous. However, based on the terms of the Judiciary Act that created federal prosecutors, federal prosecutors clearly represent the United States government.

### III. REPRESENTING THE UNITED STATES GOVERNMENT

What does it mean to represent the United States government in a criminal case? Other attorneys represent their client's interests, whatever they may be. What is the United States government's interest in a criminal case? According to the United States Supreme Court, the United States Attorney represents a sovereign who has an obligation to govern impartially.<sup>63</sup> Its interest in a criminal case goes beyond winning, but also ensuring that justice is done.<sup>64</sup> In the next sentence, the Court states that the prosecutor is a servant of the law, ensuring that the guilty are convicted and that the innocent are set free.<sup>65</sup> While this works well as an ideal, it fails to adequately define what it means to represent the government. Within these oft-quoted sentences the Court identifies not only the United States government as the prosecutor's client, but also the law. The United States government is certainly not synonymous with the law. Therefore, determining what it means to represent the United States government in a criminal prosecution requires us to look deeper than a few sentences in a Supreme Court opinion.

This section begins by examining the nature of representation. In the United States, representation begins with the people who select representatives. Once selected, representatives must decide how to represent their constituents. Must representatives adhere to instructions from their constituents or do representatives have freedom to decide what is in the constituency's best interests? Those whose views prevailed during the Constitutional Convention in 1787 had a specific answer. They believed representatives should act in the national interest and they ensured this by insulating government officials from the public will. This insulation permits prosecutors to act in the national interest without regard to public desires, at least for the most part.

#### A. *The Nature of Representation*

Understanding what it means to represent the United States government requires understanding the nature of republican governments. Working for a republican government requires that federal prosecutors understand and act in accordance with the national government's interests. As the government, itself, represents "the people," any discussion about representing the federal government must include how the federal government represents the people. In a republican government, the people possess sovereignty.<sup>66</sup> Hence the Constitution

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63. *Berger v. United*, 295 U.S. 78, 88 (1935).

64. *Id.*

65. *Id.*

66. Bernard Yack, *Popular Sovereignty and Nationalism*, 29 POL. THEORY 517 (2001). The Founders themselves never used the term "popular sovereignty." Instead, it has

begins, "We the People of the United States . . . ."<sup>67</sup> While the people are sovereign they have delegated their sovereign power to the government through representatives.<sup>68</sup> This section looks at the theoretical notions connected with popular sovereignty. How do the people govern themselves? How do they express their desires? Other scholars have sought answers to these questions. This section outlines their work and applies it to federal prosecutors.

In the years following independence, Americans experimented with republican forms of government. While the mechanics differed, they agreed that a republican form of government derived its power from the people.<sup>69</sup> Problems arose when applying this concept to practical governing. Solutions followed a continuum from direct governance to indirect governance. Direct governance meant the people made their own decisions.<sup>70</sup> Indirect governance meant the people selected representatives who made decisions for the people. The distance between the people and their representative, measured by the number of selection layers between the people and their representative, varied.<sup>71</sup> Few places utilized direct governance because it was impractical for all but the smallest towns. While indirect representation worked better with larger populations, it brought a variety of contested issues.<sup>72</sup>

Direct governance worked only in small locations such as New England towns.<sup>73</sup> During the colonial period and the years following independence, towns made decisions as a group. If the town needed a new road, the people decided first whether it was necessary and then decided its path. These discussions often took place at town hall meetings. The residents gathered at a pre-determined time and place to discuss the matter.

At the state or national level direct representation was not viable. There was not one time and one place where a large number of people could gather to discuss matters. Meetings were necessary to decide

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become a label attached to the role of the people in exercising the sovereign power of a nation. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 5 (2004).

67. U.S. CONST. pmbl.

68. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749–50 (1993–1994) (arguing that the structure of the government's daily operations derives from "the people" and that a majority of them have the power to alter it).

69. Horst Dippel, *The Changing Idea of Popular Sovereignty in Early American Constitutionalism: Breaking Away from European Patterns*, 16 J. OF THE EARLY REPUBLIC 21, 26–27 (1996).

70. KRAMER, *supra* note 66, at 5–6.

71. The Virginia governor position in the 1780s exemplifies this well. While the people selected members of the legislature, the legislature selected the governor. This made the governor a step removed from the people. See JOHN J. REARDON, EDMUND RANDOLPH: A BIOGRAPHY 87 (1974).

72. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 237–47 (1988).

73. JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 21–22 (1993).

future meeting locations and times.<sup>74</sup> Inevitably, scheduling conflicts developed. No matter the place selected, some people had to travel greater distances than others. Travel distances could determine whether someone attended or not. Coinciding with the geographic size problem, the deliberative process slowed considerably. The sheer number of people meant more speakers wanting their say. Logistics also slowed the process. Committees formed and reported back to the group. This necessitated subsequent meetings, slowing the process further. Finally, the larger size led to greater heterogeneity within the population. The small New England towns were highly homogeneous, leaving few philosophical differences.<sup>75</sup> When differences arose, people reached compromises. Expanding beyond homogenous towns, however, introduced cultural and philosophical differences. These differences were more foundational and entrenched. Compromises were not easily achieved, if achieved at all.

With direct governance impractical, people resorted to indirect governance. Indirect governance required representation, which brought a collection of questions. The first involved selection. Who selects and how? The second was whom or what does the representative represent? Should the person represent the interests of the local group that selected the representative or should that person act in the best interests of the larger body? Similarly, a decision had to be made about the size of the represented area. Should it encompass multiple towns or places? Finally, decisions had to be made about the degree of indirect representation. How many layers to place between the individual and the representative?

## 1. Selecting the Representative

There was no question, even among the most conservative Americans, that the people would select representatives.<sup>76</sup> This still left questions. When do they select the representatives? Which people make the selection? Whom do they select? The first two questions apparently were not considered in much depth following independence.<sup>77</sup> People, usually property owning males, selected representatives when nec-

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74. There were several "conventions" leading to the 1787 Constitutional Convention. For example, in 1786, five states met to discuss commerce, which led to a suggestion for another convention for a wider purpose. Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments"*, 65 FLA. L. REV. 618, 671–74 (2013).

75. SHARP, *supra* note 73, at 21–22; WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830* (1975).

76. JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 133 (1989).

77. Based on present legal and historical scholarship the questions of voting rights beyond property owning males and how often they should vote are not discussed frequently. See, e.g., SHARP, *supra* note 73; Dippel, *supra* note 69.

essary.<sup>78</sup> Answers to the third question differed during the years between independence and the Constitution.

People disagreed about who should represent specific localities. Many people believed local elites should rule.<sup>79</sup> Elites possessed certain qualities. Beyond their status as property owning white males, they were educated, which meant they were well-read.<sup>80</sup> For many, this meant they read law, philosophy, and science. More important, however, they had sufficient wealth to insulate themselves from deciding policy matters based upon self-interest.<sup>81</sup> Many believed that the only people qualified to represent others were those who could set aside self-interest. By setting aside self-interest, they could act in the polity's best interest. Few met these criteria. In the years following independence, the criteria for becoming a representative expanded. Those who lacked elite status became representatives.<sup>82</sup> From the elite's perspective, these new representatives acted on self-interest and shifted their positions based on popular passions.<sup>83</sup> From the perspective of these new representatives, they finally had the opportunity to speak on their own behalf and for their own interests.<sup>84</sup> To them, for a republic to survive, wealth had to be equally distributed.<sup>85</sup>

## 2. How to Represent

These different perspectives about the qualities of representatives spilled over to a second question. How do representatives represent their locations?<sup>86</sup> Two competing answers emerged. The first asserted that representatives represented their locations by advocating the location's interests. The second asserted that representatives must look beyond their location's narrow interests and act on behalf of the whole group. These competing answers went to the heart of the American notion of republican government, and, therefore, how prosecutors would represent the government.

Those who sided with the first answer perceived representatives as members of the group that the representative represented. This con-

78. TERRY BOUTON, *TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* 4 (2007).

79. REID, *supra* note 76, at 65–66; SHARP, *supra* note 73, at 2–3; Richard R. Beeman, *Deference, Republicanism, and the Emergence of Popular Politics in Eighteenth-Century America*, 49 *THE WM. & MARY Q.* 401, 401 (1992).

80. Beeman, *supra* note 79, at 401.

81. *Id.*; GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815* 158–59 (2009).

82. WOOD, *supra* note 81, at 20–21. Not everyone believed a convention to revise the Articles of Confederation was necessary. They were satisfied with the current system. Generally, these were the newly-minted middle class who gained from the benefits associated with their new power. CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 131 (2008).

83. WOOD, *supra* note 81, at 20–21; FRITZ, *supra* note 82, at 128–129.

84. FRITZ, *supra* note 82, at 124.

85. BOUTON, *supra* note 78, at 6.

86. *See* JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 203–205 (1996).

trasted markedly with the British conception of representation.<sup>87</sup> The British saw representatives as representing land, not people.<sup>88</sup> Americans believed representatives represented a collection of people on the land.<sup>89</sup> Representatives, under this conception, came from the people and understood their interests.<sup>90</sup> They represented these interests to the larger body. They also understood their problems. When meeting with the larger body, the representative presented these problems for resolution by the larger body.<sup>91</sup> Similarly, when the larger body raised a collective problem, the representative knew how the represented people wanted it resolved.

This raises the second answer to how representatives represented. When questions of the larger group—in this case the nation—arose, some believed the representatives should act in the nation's best interests instead of the local group's interest.<sup>92</sup> Whenever a representative (or representatives) was necessary, it meant meeting with a larger group for a larger purpose. Purposes ranged from a commission to solve a specific problem to a convention to deal with a general issue, or a legislative session designed to make laws for the larger group.

The dilemma between local and national interests arose most poignantly when representatives received instructions from the represented group.<sup>93</sup> One initial question was whether such instructions were binding on the representative. Different groups and individuals sent these instructions. It is likely that some were contradictory. Which, if any, bound the representative? Ultimately, while the Constitution protected free speech and the right to petition, representatives were left to decide how to handle instructions from represented groups.

Answering whether to represent the local interest or the national interest became much more complicated as the size of the represented area increased. Towns were relatively homogeneous. As represented areas grew, representatives represented multiple towns, each with different and potentially conflicting interests. Even if interests did not directly conflict, the representative might have to trade someone's interest in one instance to benefit someone else's interest in another instance.

This creates the denominator problem.<sup>94</sup> Who are the people? The representative must decide which people to listen to and which to ignore. This relates to the instructions issue. If the instructions come from a group at odds with the representative's desires, the representa-

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87. See REID, *supra* note 76, at 28–29.

88. *Id.* at 32.

89. J.R. POLE, *POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC* 53 (1966).

90. REID, *supra* note 76, at 65–66.

91. *Id.* at 129–133.

92. RAKOVE, *supra* note 86, at 205.

93. REID, *supra* note 76, at 99; FRITZ, *supra* note 82, at 125–128.

94. See Amar, *supra* note 68.



tive might ignore the instructions.<sup>95</sup> Similarly, the representative might follow instructions from a group with which the representative agrees. The same could occur between powerful interests. If forced to choose between two interests, the representative might choose the more powerful one.

The amount of consideration a representative gives to the people changes based on the degree of separation between the representative and the people. As the degree of separation increases, the representation becomes less direct, making representatives less connected to the people's will. The greater distance between the people and the representative means that the representative is more insulated from popular will.

Three key concepts emerge from this that are relevant to federal prosecutors. First, prosecutors must consider interests. Do they pursue local interests or do they act on behalf of national interests? Today, this poses one of the greatest dilemmas for federal prosecutorial decision-making.<sup>96</sup> Second, regardless of whose interests they follow, federal prosecutors are insulated from popular will as they are several degrees removed from election. This means prosecutors can act freely, without significant consideration of the public's desires. Finally, they must decide how to handle instructions. Though insulated, the prosecutor must still consider public opinion because the public will sit on juries and decide cases. Therefore, public demands must play some role. Prosecutors also receive instructions from the United States government. Prosecutors, as attorneys for the government, must follow these instructions. As a result, prosecutors serve the government more than the people.

### B. *Representation in the Constitution*

Against this backdrop, state representatives met in Philadelphia during the summer of 1787 to address the shortcomings of the Articles of Confederation. Each state, with the exception of Rhode Island, sent delegates. Soon after beginning, the convention's true purpose emerged. The Articles of Confederation were to be replaced with a new national government.<sup>97</sup> As the delegates designed the government, they grappled with questions raised by representation theory. How much of a voice *should* the people have in a national government? Deciding this required reconciling two competing groups holding different notions about representation.<sup>98</sup>

Prior to independence, Americans of all sorts heard the rallying cry for a voice in government. Even those not part of the elite classes

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95. REID, *supra* note 76, at 102–03.

96. For a summary of the relationship between the U.S. Attorney Offices and the Justice Department, see Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 397–409 (2009).

97. WOOD, *supra* note 81, at 31.

98. FRITZ, *supra* note 82, at 3–5.

believed their voices mattered.<sup>99</sup> Following independence, state legislatures became the focal point for the debate about representation.<sup>100</sup> They expanded to include voices from those not of the elite ruling class based on the idea that ruling was not the exclusive domain of elites.<sup>101</sup> These new representatives lacked education, wealth, and reason.<sup>102</sup> When considering policy choices, they chose self-interest or sectional interest over national interest.<sup>103</sup> Those in the ruling class saw these state legislatures as dangerous to the United States.<sup>104</sup> For America to survive, it needed a stronger national presence, one insulated from democratic excess.

People perceived these new state legislatures differently. Supporters of state legislatures tended to be agrarian. Their political views were more radical while their economic views were more traditional.<sup>105</sup> They believed they could govern themselves without resorting to “heavy” government.<sup>106</sup> Many lived on farms, and their interests and concerns differed from those who lived in the growing cities and towns. They were unaware of the growing merchant class that made its living on commerce. Their perception of America also differed, seeing it as thirteen independent states joining for collective security.<sup>107</sup>

Opponents of state legislatures saw the legislative actions taken as a consequence of democratic excess.<sup>108</sup> “Common” people had too much influence. Rather than govern based on common interest, state legislatures responded only to rapidly changing popular passions. The ruling elites believed that a national government was necessary to restrain these popular passions.<sup>109</sup> Without proper restraint, they argued, the nation would collapse from sectional in-fighting. Inherent in this perspective was the idea that the United States was a whole, a single nation rather than thirteen independent states.<sup>110</sup> Adherents to this view met to form the United States Constitution.

99. SIMON P. NEWMAN, *PARADES AND THE POLITICS OF THE STREET: FESTIVE CULTURE IN THE EARLY AMERICAN REPUBLIC* 5–6 (1997).

100. See HURST, *supra* note 37, at 23–25.

101. FRITZ, *supra* note 82, at 124.

102. *Id.*; WOOD, *supra* note 81, at 27–28.

103. MORGAN, *supra* note 72, at 254.

104. WOOD, *supra* note 81, at 19, 31. Wood states: “[B]y the 1780s many leaders had come to realize that the Revolution had unleashed social and political forces that they had not anticipated and that the ‘excesses of democracy’ threatened the very essence of their republican revolution.” *Id.* at 19.

105. Thomas Jefferson is the prime example of this “country” viewpoint. He vehemently disliked the mercantile interests and stock jobbers that were emerging at this time. JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 132–33 (1996). For a description of the “country” viewpoint and its contrast to the “court” mentality, see STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800* 14–24 (1993).

106. Jefferson referred to governments as “heavy” or “light” depending on how much coercion they used on the people. FRITZ, *supra* note 82, at 134.

107. WOOD, *supra* note 81, at 7.

108. *Id.* at 19–20.

109. FRITZ, *supra* note 82, at 117–18, 122.

110. WOOD, *supra* note 81, at 53–54.

The delegates to the Constitutional Convention wanted a government where the people had a voice; they simply wanted to limit that voice.<sup>111</sup> To accomplish this the delegates used two devices. They divided government powers amongst three branches: the legislative, executive, and judicial. Separating these powers demonstrated their commitment to a government by the people. By separating the powers, the delegates hoped to prevent any one person or group from accumulating too much power.<sup>112</sup> Once they accomplished this, their second device involved varying the degrees of representation. This gave the people a strong voice in some instances but restrained it in others.

The combination of separating powers and varying degrees of representation is seen most clearly in the legislative branch. Congress has two houses. The delegates made the House of Representatives closest to the people. Members represented a specific area and number of people. The people selected these representatives directly through elections held every two years. The Senate was a step removed from the people because its members were elected by state legislatures. While the people selected state legislators, the people lacked a voice when the legislature chose the Senators.<sup>113</sup> Senators were, essentially, the representatives of the state legislatures. Combining this with six-year terms made Senators more insulated from public opinion than House members.

The executive branch and its connection to the people became one of the more difficult challenges the delegates faced. It emerged when they debated the relationship between the executive and the legislature.<sup>114</sup> Ultimately the delegates disconnected the executive and legislative branches. This forced them to determine whether the people should directly elect the executive. The delegates insulated the executive from direct election through an electoral college.<sup>115</sup> The people chose electors who then met to choose the executive.<sup>116</sup> The person selected as President served a four-year term.<sup>117</sup> As a single executive, not connected to the legislature, the President became the only person representing the entire nation's interests.

Among the three branches, the judicial branch was most insulated from the people. As New York delegate Alexander Hamilton later

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111. KRAMER, *supra* note 66, at 5–6; *see also* FRITZ, *supra* note 82, at 7.

112. Dippel, *supra* note 69, at 29.

113. In 1912, Congress passed the Seventeenth Amendment which made Senators directly elected by the people. The states ratified the amendment in 1913. *The Constitution: Amendments 11–27*, NATIONAL ARCHIVES (2016), <https://www.archives.gov/founding-docs/amendments-11-27> (last visited Nov. 6, 2016).

114. The differing views of Alexander Hamilton and James Madison illustrate this point. Together, they drafted most of the Federalist Essays and strongly supported ratification of the Constitution. However, they conceived of executive power differently. Hamilton believed a strong national government was necessary and that the Executive had the potential to be most powerful. Madison, on the other hand, saw the Executive as a mediator between conflicting interests and ensuring the legislature did not abuse its power. *See* WOOD, *supra* note 81, at 32–33, 72.

115. U.S. CONST. art. II, § 1.

116. *Id.*

117. *Id.*

wrote in *The Federalist*, the judiciary was the least dangerous branch of the three.<sup>118</sup> The President selected judges.<sup>119</sup> This made federal judges two steps removed from the people. The advice and consent of the Senate did not make federal judges any closer to the people, as the Senators themselves were a step removed. To further insulate federal judges, the delegates gave them life tenure.<sup>120</sup> Despite insulation, the judiciary was least dangerous because judicial authority was limited. Colonial courts were governing bodies that not only resolved cases but made binding decisions about town administration.<sup>121</sup> The Constitution, however, removed their policymaking role, permitting them to hear only “cases or controversies” arising under the Constitution.<sup>122</sup> Once they decided these cases, they had no enforcement power. This was left to the executive.

With the three-branch framework complete, a committee drafted a document that became the Constitution. Not every delegate signed it, thus signaling a contentious ratification process. Anti-Federalists, those who opposed ratification, made two broad arguments.<sup>123</sup> First, many feared the national government’s power. Nothing in the Constitution guaranteed the people’s rights and liberties. Second, the opponents believed the Constitution went too far when insulating the government from the popular will.<sup>124</sup> Despite these objections, at state ratification conventions, other representatives voted to adopt the new Constitution. Many believed this made the new government “of the people” and that the people’s voice was now limited to elections. Others believed the people had avenues other than approving the Constitution and electing representatives to voice their beliefs about government policies and actions.

Federal prosecutors found themselves connected to all three branches. Their creation in the Judiciary Act gave the impression that they were judicial figures. This corresponded with the state practice. However, it was also clear that federal prosecutors were executive officials. The President appointed them and they represented the United States. Finally, the Senate had to approve the President’s choices. This,

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118. THE FEDERALIST NO. 78 (Alexander Hamilton) (“Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”).

119. U.S. CONST. art. II, § 2.

120. U.S. CONST. art. III, § 1.

121. NELSON, *supra* note 75, at 13–14.

122. U.S. CONST. art. III, § 2.

123. FRITZ, *supra* note 82, at 137, 142–43.

124. *Id.* at 145–46.

in a small way at least, connected prosecutors to the legislative branch. How prosecutors would function in their new role and their connection to the people was left to the first executive administration under the Constitution: the Washington administration.

C. *The Washington Administration's Representatives: Selecting United States District Attorneys*

Upon assuming office in 1789, George Washington understood the precedent-setting nature of his role.<sup>125</sup> One key precedent was the relationship between the people and the federal government. Having led the Continental Army during the war and chaired the Constitutional Convention, Washington was firmly in the Federalist camp and supported a strong federal government.<sup>126</sup> At the same time, he was sensitive to the people's fears that the national government could become monarchical. Therefore, Washington sought to balance his ideology with the people's fears. As he sought this balance, factions developed inside his administration that questioned what it meant to represent the people.

Washington hoped to allay the people's concerns with symbolic actions. On his inaugural journey from Mount Vernon to New York, Washington refused favors from citizens, staying in public lodgings rather than private homes.<sup>127</sup> He did not want to fall beholden to anyone. Once in New York, he located and financed his own lodgings. Once in office, he made his home open to the public. Between Congressional sessions, he took tours of the northern and southern states.<sup>128</sup> At each stop on these tours he met with the people, often staying in public accommodations. By doing these things, he brought the government to the people. His actions demonstrated the significance of the people to the new nation. Yet this was a top-down approach. Washington brought the government to the people, hoping to generate respect for the new government. These actions encapsulated the approach he would take in federal law enforcement matters.

While Washington focused on reconciling competing external viewpoints, he found himself doing the same internally as the public's divisions manifested themselves in his administration. His Secretary of Treasury, Alexander Hamilton, and Secretary of State, Thomas Jefferson, took opposing and irreconcilable views on the federal government's purpose and power. By the late 1790s, the opposing views formed political parties. However, at the outset, Washington held the rivals together based solely on his reputation and determination.<sup>129</sup>

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125. PHELPS, *supra* note 54, at 127–31.

126. JOHN FERLING, *JEFFERSON AND HAMILTON: THE RIVALRY THAT FORGED A NATION* 220–21 (2013).

127. HEIDLER & HEIDLER, *supra* note 54, at 320.

128. WOOD, *supra* note 81, at 72–78 (discussing Washington's understanding of the symbolic nature of his work); PHELPS, *supra* note 54, at 127–28 (stating that Washington took these tours in 1789 (to the northern states) and 1791 (to the southern states)).

129. SHARP, *supra* note 73, at 27; PHELPS, *supra* note 54, at 131.

Washington's ideological position aligned closer with Hamilton's.<sup>130</sup> Both believed a strong national government was necessary to not only preserve the Union but to also make the new nation stronger. This meant centralizing power and insulating the federal government from the people's variable and conflicting desires.<sup>131</sup> Hamilton believed the Presidency had the most potential to accomplish this.<sup>132</sup> Therefore, his proposals and actions emphasized presidential power by stretching the Constitution's words to their limits. He established this early in Washington's administration by successfully gaining approval to assume the state's Revolutionary War debt and chartering the Bank of the United States.<sup>133</sup>

Jefferson was Hamilton's chief rival in the cabinet, differing in their political ideology. Where Hamilton feared the masses, Jefferson put his faith in them.<sup>134</sup> To Jefferson, the American government was a great experiment in the people's ability to rule themselves. Liberty, he believed, required that people be free from government. While accepting a position in the new national government and understanding the need for a national government, Jefferson believed the design gave the national government too much power. He sought to limit the national government's reach to the specific terms written in the Constitution itself. This fundamental philosophical difference caused Jefferson and Hamilton to clash at nearly every turn.

The fundamental divide between Jefferson and Hamilton resulted from their opposing beliefs about the voice people should have in government. Hamilton believed in a top-down approach where the government coerced the people's compliance.<sup>135</sup> Jefferson preferred a bottom-up approach where the government answered to the people.<sup>136</sup> In Hamilton's view, the government spoke to the people through actions. In Jefferson's view, the people spoke to the government through elections and acts of popular sovereignty. This distinction formed the basis for the debate over the federal government's law enforcement powers, particularly neutrality enforcement in 1793. This debate created the precedent that the United States District Attorneys represented the United States government and spoke to the people through symbolic policy enforcement, rather than acting based upon popular sovereignty or popular opinion.

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130. FERLING, *supra* note 126, at 217–18.

131. ELKINS & MCKITTRICK, *supra* note 105, at 21–24.

132. WOOD, *supra* note 81, at 72.

133. ELKINS & MCKITTRICK, *supra* note 105, at 223–24, 232–33.

134. WOOD, *supra* note 81, at 10–12; ELLIS, *supra* note 105, at 113.

135. RON CHERNOW, *ALEXANDER HAMILTON* 232 (2004) (“Of all the founders, Hamilton probably had the gravest doubts about the wisdom of the masses and wanted elected leaders who would guide them.”).

136. FRITZ, *supra* note 82, at 135.

#### IV. SETTING THE PRECEDENT FOR FEDERAL PROSECUTORS REPRESENTING U.S. GOVERNMENT POLICY

##### A. Law Enforcement Problems

As Washington's first term drew to a close and the second one began, the administration faced its first federal law enforcement issues. Western Pennsylvanians began organized resistance to Hamilton's whiskey excise tax, refusing to pay and forcibly threatening others to prevent them from paying.<sup>137</sup> In August 1792, Hamilton learned about the violent resistance to his whiskey tax in western Pennsylvania. The revenue inspector reported that the person who permitted the revenue collector to remain in his house had been confronted by a group that "drew a knife on him, threatened to scalp him, tar & feather him, and finally to reduce his House and property to ashes if he did not solemnly promise them to prevent the office of Inspection from being there."<sup>138</sup> Hamilton instructed the revenue inspector to investigate and seek prosecution if warranted.<sup>139</sup> On the same day, Hamilton wrote Washington informing him of the situation.<sup>140</sup> Hamilton proposed requesting Attorney General Edmund Randolph to decide if an indictable crime had occurred and, if so, whether to prosecute it during the upcoming federal court session in York, Pennsylvania.<sup>141</sup> Hamilton believed that if there was evidence that a crime occurred, the government had to act quickly and forcibly through the courts. Randolph wasted little time responding.<sup>142</sup> Having perused Carolina and Pittsburgh newspapers as his information source, Randolph concluded that the acts committed were acts of free expression and not punishable by the Courts.<sup>143</sup> Hamilton was not deterred and convinced Randolph to attend the next court session.<sup>144</sup> Randolph and United States District Attorney William Rawle prepared and obtained indictments against several suspected protesters.<sup>145</sup> The cases were dismissed when further investigation revealed mistaken identity.<sup>146</sup>

This small situation set the precedent for much of what would occur during Henfield's case. Hamilton initiated enforcement and

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137. THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 113–16 (1986); ELKINS & MCKITTRICK, *supra* note 105, at 462–63.

138. *THE PAPERS OF ALEXANDER HAMILTON*, vol. 12, JULY 1792?–OCTOBER 1792 305–310 (1967) (citing a letter from John Neville to George Clymer, in possession of the Connecticut Historical Society, Hartford).

139. *Id.*

140. *Id.* 311–13.

141. *Id.*

142. *Id.* 336–340.

143. *Id.*

144. HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 30 (1937).

145. *Id.* But see MAEVA MARCUS, 2 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1897–1800* 2, 306 (1988) (noting that the minutes for the session are scarce and that there are no entries for any cases. Apparently, as was frequently the case, the court was brought to session, a grand jury was charged, and the next day the session was completed because of the lack of business).

146. CUMMINGS & MCFARLAND, *supra* note 144, at 30.

used people from his department to carry out law enforcement action. Once he had some evidence, he directed the federal attorneys to proceed with the case.<sup>147</sup> Despite their reluctance, which was based on constitutional grounds, the attorneys proceeded with cases and enforced administration policy. The cases were dismissed only because they had the wrong people. Presumably this information came from witnesses or defense attorneys.

While the administration discussed its response to the tax protesters, events overseas diverted the administration's attention. French revolutionaries deposed King Louis XVI.<sup>148</sup> In the following months, those same revolutionaries executed him and declared war on the rest of Europe, including Great Britain.<sup>149</sup> Washington responded by declaring neutrality and proclaiming violators would be prosecuted.<sup>150</sup> Enforcing neutrality created another Jefferson-Hamilton clash. They clashed over more than ideological differences but those came to the fore. Characteristically, Hamilton made the first move. He drafted a circular letter to the Customs Collectors instructing them to report neutrality violations directly to him.<sup>151</sup> Prior to sending it, Hamilton showed it to Washington who requested that Hamilton discuss it with Jefferson and Randolph.<sup>152</sup> Afterward, Jefferson objected to the instructions. Following the meeting, Jefferson expressed his objections more fully in a letter to Randolph, describing a more people-centered conception of federal law enforcement.<sup>153</sup> Using the Customs Collectors, Jefferson argued, made them a corps of spies.<sup>154</sup> Instead, Jefferson argued the government should rely on judges and grand jurors to enforce neutrality laws. Grand jurors were the constitutional investigators. They had no interest in the outcome, and their work was public. In this sense, the grand jurors represented the local jurisdiction where the neutrality violation took place. Customs Collectors, conversely, had an incentive to make false allegations and were not answerable to the public. Hamilton, a Presidential appointee himself, appointed them. This made the Customs Collectors four steps removed from the peo-

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147. It is important to note here that the Attorney General was seen as subordinate to the other cabinet officials at this time. It was not until the spring of 1793 that the Attorney General became a more significant figure. See *infra* notes 218–19; BLOCH, *supra* note 19, at 571.

148. SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION*, 614–15 (Alfred A. Knopf ed., 1989).

149. *Id.* at 668–69.

150. Neutrality Proclamation (Apr. 22, 1793), in 12 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES* 16 JANUARY 1793?–?31 MAY 1793 472–74 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005).

151. See Letter from Thomas Jefferson to Edmund Randolph (May 8, 1793), in 25 *THE PAPERS OF THOMAS JEFFERSON*, Jan. 1–May 10, 1793, 691–92 (John Catanzariti ed., 1992) (The draft circular letter cannot be located. We know it exists from the letter writing and meetings it generated.).

152. *Id.* at 667–68.

153. *Id.* at 691–92.

154. *Id.*



ple.<sup>155</sup> Randolph wrote back to Jefferson agreeing with Jefferson in principle but with Hamilton in practice. Randolph made one key alteration, however.<sup>156</sup> Rather than have the Customs Collectors report to Hamilton, Randolph proposed that the Customs Collectors work directly with the United States District Attorneys.<sup>157</sup> As usual with neutrality matters, Randolph's position prevailed.<sup>158</sup>

### B. *Ensuring Compliance from Washington's Attorneys*

During the spring and summer of 1793, the United States found itself between the warring French and British powers. Not wanting to join the war, the Washington administration proclaimed neutrality and warned American citizens not to assist either side. Making this proclamation proved simpler than enforcing it. Citizens attempted to aid both sides forcing the administration and its prosecutors to respond. Comparing the administration's response and the citizens' actions reveals a stark contrast. While the government hoped to steer a neutral course between the warring sides, most Americans wanted to support France and many wanted to fight for it. Prosecutors unquestionably followed their client's wishes, prosecuting cases as they saw fit.

Prosecutorial loyalty to the administration's policies began when Washington filled the newly-created United States District Attorney positions in September 1789. He selected local people who were loyal to the new national government thus securing a group predisposed to follow his instructions. They executed these instructions during the neutrality crisis despite strong public sympathies for the French. The people expressed their opinion in a variety of ways, but each time the national government and its attorneys adhered to neutrality. They did this even with the knowledge that public support was necessary to successfully prosecute cases. Even when juries rejected their cases, federal prosecutors continued enforcing neutrality according to administration instructions. This was hardly judicial or magisterial behavior. These federal prosecutors were advocates, changing their positions as the federal government developed its neutrality policy.

Immediately after Washington signed the Judiciary Act, he filled the new attorney positions.<sup>159</sup> Washington understood these initial

155. The people selected the Electoral College (first step). The Electoral College selected the president (second step). The president selected the treasury secretary with the Senate's consent (third step). The treasury secretary selected the customs collector (fourth step).

156. Letter from Edmund Randolph to Thomas Jefferson (May 9, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, Jan. 1–May 10, 1793, 700–02 (John Catanzariti ed., 1992).

157. *Id.*

158. Letter from Thomas Jefferson to James Madison (May 13, 1793) in 26 THE PAPERS OF THOMAS JEFFERSON, May 11–Aug. 31, 1793, 25–27 (John Catanzariti ed., 1995).

159. Letter from George Washington to Edmund Randolph (28 September 1789), in 4 THE PAPERS OF GEORGE WASHINGTON, Sept. 8, 1789–Jan. 15, 1790, 106–09 (John Dorothy Twohig ed., 1993) ("Impressed with a conviction that the due administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and to the stability of its' political system—hence the selection of the fittest characters to expound the laws, and

selections were precedent-setting.<sup>160</sup> He sought attorneys loyal to the national government and who had strong local reputations.<sup>161</sup> These selections would be the new federal government's representative in each of the federal judicial districts. The nominees included Pierpont Edwards,<sup>162</sup> who served in the role for sixteen years and as a federal judge for twenty more; Christopher Gore,<sup>163</sup> who later served as Massachusetts Governor and United States Senator; Richard Harison,<sup>164</sup> Treasury Secretary Alexander Hamilton's law partner for a time; and John Marshall,<sup>165</sup> the future Supreme Court Chief Justice. Apparently, Washington made the nominations without consulting the nominees. In Kentucky, the nominee, George Nicholas,<sup>166</sup> a friend of James Madison, declined the nomination. Washington's second choice, James Brown, also refused the nomination.<sup>167</sup> John Marshall declined the Virginia U.S. District Attorney position stating it would interfere with his business in state courts.<sup>168</sup> However, despite these few failures, most of Washington's initial appointments remained in their posts for several years. Those who left did so after receiving more prestigious federal appointments.<sup>169</sup>

Washington's appointees had some similarities. First, several had loyalist parents. Christopher Gore's family remained loyal to the Brit-

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dispense justice, has been an invariable object of my anxious concern."); *see also* Wood, *supra* note 81, at 86–88.

160. Wood, *supra* note 81.

161. *Id.*, at 107–09. Selecting local attorneys also set a precedent that continues today in the form of Senatorial courtesy.

162. Charles A. Heckman, *A Jeffersonian Lawyer and Judge in Federalist Connecticut: The Career of Pierpont Edwards*, 28 CONN. L. REV. 669 (1996).

163. Gore, Christopher, (1758-1827), BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS (2016), <http://bioguide.congress.gov/scripts/biodyisplay.pl?index=G000322> (last visited Oct. 26, 2016, 2:25 PM).

164. JULIUS L. GOEBEL, JR., 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY (1964). The exact nature of their partnership is not clear. Law partnerships in the 1780s functioned differently than today. Often, these partnerships formed because of a case or a collection of cases. It appears that Hamilton and Harison both represented loyalists in New York following Independence and partnered in that sense. *Id.* at 1–2, 231–32.

165. Letter from John Marshall to George Washington (14 October 1789), in 4 THE PAPERS OF GEORGE WASHINGTON, Sept. 8, 1789–Jan. 15, 1790, 192–93 (Dorothy Twohig ed., 1993).

166. MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789–1816 66–70 (2016) (discussing the numerous people who had rejected the Kentucky position).

167. *Id.*

168. Letter from John Marshall to George Washington, *supra* note 164. Apparently, Washington spoke with a Samuel Griffin about various Virginians who would serve ably in the national judicial offices. Griffin put together a list, including Marshall. *Conversation with Samuel Griffin, 9 July 1789*, FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-03-02-0075> (last updated Oct. 5, 2016). This would be the first of three federal appointments that Marshall declined. Washington sought to make Marshall Attorney General and Adams sought to make Marshall an Associate Supreme Court Justice. *See* DAVID SCOTT ROBARGE, A CHIEF JUSTICE'S PROGRESS: JOHN MARSHALL FROM REVOLUTIONARY VIRGINIA TO THE SUPREME COURT (2000).

169. *Senate Journal*, JOURNAL OF CONGRESS, <http://memory.loc.gov/ammem/amlaw/lwsj.html> (listing Senate Journals from 1789–1801).

ish.<sup>170</sup> William Rawle, Pennsylvania's second United States District Attorney, came from loyalist parents as well.<sup>171</sup> Abraham Ogden of New Jersey came from a divided family, as did Attorney General Edmund Randolph.<sup>172</sup> Richard Harison, himself, had been a loyalist and, as a result, lost his law license until the early 1780s.<sup>173</sup> These loyalist tendencies most likely pushed them toward strong centralized governments. Others served in the Revolutionary War. John Sitgreaves, from North Carolina, served as a Lieutenant.<sup>174</sup> John Sherburne served in the New Hampshire militia, rising to the rank of Major.<sup>175</sup> This demonstrated their loyalty to Washington. Most early federal prosecutors also displayed early Federalist tendencies in the Hamilton/Jefferson divide. In Pennsylvania, a very Republican state, the first two appointees, William Lewis<sup>176</sup> and William Rawle,<sup>177</sup> were Federalists. Christopher Gore also emerged as a Federalist and championed the cause long after it ceased to be politically popular. This made them ideologically compatible to the administration's policies.

They had one other similarity: strong local reputations. They came from prominent families or had developed strong individual reputations. All either were known to Washington or came personally recommended by someone Washington had asked to provide recommendations. Two were sons of signers of the Declaration of Independence.<sup>178</sup> One United States District Attorney taught law to his predecessor in the office.<sup>179</sup> Washington knew that for his choices to represent the new government successfully, the United States District Attorneys had to have the community's respect. If the public saw these prominent local attorneys adhering to and enforcing new national laws, the people would be less likely to oppose the new government and not fear national power. In this sense, the United States District Attorneys not only filled a practical legal role in the new government but also played a highly symbolic role. Like Washington's tour of the United States, this was a top-down approach to federal government.

170. HELEN PINKNEY, CHRISTOPHER GORE, *FEDERALIST OF MASSACHUSETTS, 1758-1827* 5-7 (1969).

171. Rawle Family Papers, THE HISTORICAL SOCIETY OF PENNSYLVANIA, [http://hsp.org/sites/default/files/legacy\\_files/migrated/findingaid0536rawle.pdf](http://hsp.org/sites/default/files/legacy_files/migrated/findingaid0536rawle.pdf).

172. 4 ABRAHAM OGDEN, APPLETON'S CYCLOPAEDIA OF AMERICAN BIOGRAPHY 560 (James Grant Wilson & John Fiske eds., 1900).

173. Explanatory Note and Law License, Richard Harison Papers, Columbia University Library.

174. *Sitgreaves, John*, (1757-1802), BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000459> (last visited Jan. 13, 2016).

175. *Sherburne, John Samuel*, (1757-1830), BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000339> (last visited Jan 13, 2016). Interestingly, Sherburne would leave office in December 1793 to take a Congressional seat as an anti-administration member.

176. ESTHER A. MCFARLAND & MICKY HERR, WILLIAM LEWIS, ESQUIRE: ENLIGHTENED STATESMAN, PROFOUND LAWYER, AND USEFUL CITIZEN (2012).

177. Rawle Family Papers, *supra* note 171.

178. *The Founding Fathers: Delaware*, NATIONAL ARCHIVES, [http://www.archives.gov/exhibits/charters/constitution\\_founding\\_fathers\\_delaware.html](http://www.archives.gov/exhibits/charters/constitution_founding_fathers_delaware.html).

179. ABRAHAM OGDEN, *supra* note 172, at 560-61.

### C. Neutrality Enforcement

During the spring and summer of 1793, the neutrality crisis tested respect earned by the new national government. The situation was particularly acute in Philadelphia, the seat of the national government. Reports of French privateering activities and Americans assisting in those activities reached the Washington administration.<sup>180</sup> After some debate, the administration took law enforcement action.<sup>181</sup> In the midst of enforcement efforts, Washington sought the public's opinion. Yet the results seemingly had little impact on decision-making. The administration pressed on with prosecutions even as Americans aided the French and ignored similar cases of aid to the British. Even when Gideon Henfield, the first of those prosecuted, was acquitted, the administration continued enforcing neutrality despite the objections of a significant number of the population.

#### 1. Understanding Public Opinions

Washington and his cabinet knew successful policy enforcement required public support. Without it, the United States could easily be pulled into the European war, something it had to avoid.<sup>182</sup> Americans took great interest in the French Revolution, but their opinions, like Washington's cabinet, were divided. In February 1793, the French sent a new minister to the United States named Edmond Charles Genet.<sup>183</sup> Rather than go to Philadelphia, Genet landed at Charleston, South Carolina.<sup>184</sup> When Genet arrived, the Charleston community's French supporters embraced him enthusiastically. South Carolina's Governor, William Moultrie, formed a close relationship with Genet.<sup>185</sup> Supposedly, Genet queried Moultrie about outfitting privateers in Charleston. Apparently, Moultrie responded that he knew of no law prohibiting it.<sup>186</sup> This encouraged Genet's privateering activities. Genet remained

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180. British minister to the United States, George Hammond, wasted little time informing the government whenever British ships fell prey to the French privateers. See, e.g., Memorial from George Hammond (May 2, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON: JAN. 1–MAY 10, 1793, 25–27 (John Catanzariti ed., 1992); Memorial from George Hammond with Jefferson's Notes (May, 8 1793), in 25 THE PAPERS OF THOMAS JEFFERSON, JAN. 1–MAY 10, 1793, 685–86 (John Catanzariti ed., 1992).

181. This debate took place over the course of a week. Hamilton wanted to use the Treasury Department to investigate the case. Jefferson objected, preferring to use the Grand Jury as an investigative body.

182. CHARLES MARION THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT 14–17 (1931).

183. HARRY AMMON, THE GENET MISSION 19, 31 (1973).

184. WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 35 (2006).

185. C.L. BRAGG, CRESCENT MOON OVER CAROLINA: WILLIAM MOULTRIE AND AMERICAN LIBERTY 256 (2013); ELKINS & MCKITTRICK, *supra* note 105, at 335; CASTO, *supra* note 184, at 45–47. This conversation occurred not only before Moultrie had notice of Washington's proclamation but before Washington even issued the proclamation.

186. The "supposedly" and "apparently" are used in this context because the only evidence that this conversation occurred comes from a report Genet sent to the French Government. It is possible that Genet exaggerated, perhaps even fabricated, this event in order to justify his actions to his government. For more on the context of this report, see

several days preparing privateers. While most Charleston residents supported Genet's activities, some factions strongly opposed French privateering. As a port city, many merchants relied upon British commerce for survival.<sup>187</sup> French privateering disrupted this trade. The affected merchants complained and rumors of Moultrie's potential impeachment circulated.<sup>188</sup>

After ten days in Charleston, Genet began a twenty-eight-day land journey to Philadelphia.<sup>189</sup> Along the way, he enjoyed enthusiastic public reception in each town he visited.<sup>190</sup> Genet perceived this as the embodiment of American support for France and, therefore, indicative of America's policy toward France. The parties and festivals continued when he arrived in Philadelphia on May 18th. Popular sentiment in Philadelphia strongly favored France, so upon Genet's arrival large numbers of people celebrated and marched through the Philadelphia streets to Genet's lodgings. They delivered welcoming addresses supporting his mission.<sup>191</sup> That night the welcoming committee hosted a large celebration with toasts honoring Genet and the success of the French Republic.<sup>192</sup>

Newly-formed Democratic-Republican societies organized these events and demonstrations.<sup>193</sup> These societies sought to fill the emerging gap between the people and the government. They publicly announced their formation through politically-sympathetic newspapers. Other newspapers copied the story, thus bringing national attention to the movement.<sup>194</sup> While not intended as partisan, the groups emerged as opposition to Hamilton's Federalist policies. By uniting like minds across the country, they also bridged the gap that had formed between national interests and local interests.<sup>195</sup> The societies, in their infancy during the neutrality crisis, passed and publicized resolutions hoping to influence the administration. One of the first organizations was the Democratic Society in Philadelphia.<sup>196</sup> It maintained close ties to the Friends of Liberty and Equality.<sup>197</sup> This latter group sold subscriptions

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Letter from William Vans Murray to Alexander Hamilton (May 8, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, Feb.-June 1793, 425-28 (Harold C. Syrett ed., 1969); see also BRAGG, *supra* note 184, at 356-58.

187. ROBERT J. ALDERSON, JR., THE BRIGHT ERA OF HAPPY REVOLUTIONS: FRENCH CONSUL MICHEL-ANGE-BERNARD MANGOURIT AND INTERNATIONAL REPUBLICANISM IN CHARLESTON 1792-1794 40-53 (2008); BRAGG, *supra* note 185, at 256-57; CASTO, *supra* note 184, at 46-47.

188. BRAGG, *supra* note 185, at 158.

189. AMMON, *supra* note 183, at 45.

190. ELKINS & MCKITTRICK, *supra* note 105, at 335.

191. *Id.* at 342.

192. Christopher J. Young, *Connecting the President and the People: Washington's Neutrality, Genet's Challenge, and Hamilton's Fight for Public Support*, 31 J. EARLY REPUB. 435, 443 (2011).

193. Albrecht Koschnik, *The Democratic Societies of Philadelphia and the Limits of the American Public Sphere, circa 1793-1795*, 58 WM. & MARY Q. 615 (2001).

194. *Id.* at 622.

195. *Id.* at 617.

196. *Id.* at 619.

197. *Id.* at 618-19.

to support the French military and held celebrations honoring French victories.

With Republicans celebrating Genet's arrival, Hamilton and the Federalists began countering these demonstrations.<sup>198</sup> Unable to match the size and volume of Genet's supporters, Hamilton rallied Philadelphia merchants. They marched to the President's house and presented Washington with an address supporting the neutrality proclamation.

Faced with conflicting demonstrations, Washington sought a wider sample of opinions. Washington directed Attorney General Edmund Randolph to conduct two surveys. First, Randolph spoke with Philadelphia merchants about compensating Great Britain for the vessels French privateers seized.<sup>199</sup> Randolph returned and informed Washington that the merchants in Philadelphia were themselves not well informed about the issue; however, generally speaking, they were predisposed to support Great Britain.<sup>200</sup> Other citizens, according to Randolph, opposed restitution.<sup>201</sup> The second survey required a more extensive journey as Washington sent Randolph south through Delaware, Maryland, and Virginia to gauge opinions on neutrality.<sup>202</sup> In many of the places he stopped, Randolph attended the general court sessions where he found people of every sort.<sup>203</sup> He surveyed their reactions to the neutrality proclamation and made efforts to correct misperceptions.<sup>204</sup> In Maryland, he found many were concerned about French privateering activity as the privateers had used Maryland to hide vessels.<sup>205</sup> He made efforts to reassure the people and believed he did so.<sup>206</sup> As Randolph ventured south, he encountered concerns about Hamilton.<sup>207</sup> Randolph also spoke to several people about Henfield's prosecution.<sup>208</sup> He reported that people were initially opposed to the

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198. THOMAS, *supra* note 182, at 89.

199. REARDON, *supra* note 71, at 230. This is perhaps one of the first incidents of the undefined responsibilities of federal prosecutors. Taking a survey of merchants and meeting with the citizenry to educate and persuade them on policy matters goes beyond representing the United States in court and providing legal advice to the departments. For implications this has for today's prosecutors, see Laurie Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L. J. 553, 555–57 (1998).

200. *Id.*

201. *Id.*

202. *Id.* at 232.

203. Letter from Edmund Randolph to George Washington (June 24, 1793), in 13 THE PAPERS OF GEORGE WASHINGTON, June 1–August 31, 1793, 137–42 (Christine Sternberg Patrick, ed., 2007); Letter from Edmund Randolph to George Washington (June 11, 1793), in 13 THE PAPERS OF GEORGE WASHINGTON, June 1–August 31, 1793, 60–62 (Christine Sternberg Patrick, ed., 2007).

204. *Id.*

205. Letter from Edmund Randolph to George Washington (June 11, 1793), in 13 THE PAPERS OF GEORGE WASHINGTON, June 1–August 31, 1793, 60–62 (Christine Sternberg Patrick, ed., 2007).

206. *Id.*

207. Letter to George Washington from Edmund Randolph (Jun. 24, 1793), in 13 THE PAPERS OF GEORGE WASHINGTON 137–42 (Christine Sternberg Patrick, ed., 2007).

208. *Id.*

case; however, as he informed them of the case facts, they indicated that Randolph provided evidence that they had not heard previously.<sup>209</sup> This, according to Randolph, changed their minds about the case.<sup>210</sup> Ultimately, Randolph concluded that those who opposed the proclamation were those who had opposed ratification of the Constitution five years prior.<sup>211</sup>

In addition to Randolph's excursions, Washington's administration received letters and petitions from various parts of the nation expressing either individual or collective opinions about neutrality. Petitioning in this manner had become increasingly common as citizens compiled grievances and suggested resolutions.<sup>212</sup> Even before the neutrality proclamation was issued, a Boston merchant wrote Hamilton inquiring, "If the Executive could by proclamation inform the public on this Subject it would do great good, or prevent much mischief. Will not the Citizens be prohibited from taking any part under cover or openly? Some of our old adventurers in privateering who are again reduced will require a tight Rein to prevent them."<sup>213</sup> In June, as the controversy intensified, others voiced their opinions. Henry Lee, Virginia's Governor, expressed concern that American citizens aiding France might disrupt British relations.<sup>214</sup> Samuel Smith, a Maryland merchant who would begin his term in the U.S. House in December, offered his support for the neutrality proclamation and his opposition to permitting the French to sell their prizes in American ports. Both Smith and Lee stated their concerns in the context of "true friends of this country." In Lee's case, Hamilton forwarded the letter to Washington as evidence of the public's opinion on the matter. Groups also sent petitions to President Washington in the form of resolutions from various town meetings. Washington read them and gratefully responded.

## 2. Administration Policy Enforcement

Though Washington undoubtedly was concerned about the public's perception, the nation's security took precedence. The administra-

209. *Id.*

210. *Id.* While it is never explicitly stated and Washington's reaction to Randolph's reports is not known, one wonders if the government would have proceeded with the case had Randolph not believed that he persuaded those whom he met. It is possible that Randolph's reports gave the administration reason to think that their prosecution of Henfield might be successful once the evidence was heard.

211. *Id.*

212. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153 (1998).

213. Letter to Alexander Hamilton from Stephen Higginson (Apr. 10, 1773), in 14 *THE PAPERS OF ALEXANDER HAMILTON* 305-306 (Harold C. Syrett ed., 1969). Higginson was a Boston merchant and a one-time member of the Continental Congress. Once Hamilton became Treasury Secretary, Higginson often wrote to Hamilton informing him about various matters.

214. Letter to George Washington from Henry Lee (Jun. 14, 1773), in 13 *THE PAPERS OF GEORGE WASHINGTON* 77-80 (Christine Sternberg Patrick, ed., 2007). For the various posts held by Lee, see *Lee, Henry, (1756-1818)*, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=L000195>.

tion had to respond to neutrality violations. Cabinet discussions focused on individual cases as reports of French privateering activities arose so quickly that the cabinet could not craft an overarching policy. Yet, while they discussed individual cases, broader ideas arose. Hamilton, recognizing that his revenue officials were the closest to the scene, proposed that the government use them to report on violations. He offered to collect their reports, review them, and send the most serious violations to the United States District Attorneys for prosecution.

Predictably, Jefferson opposed this arrangement, proposing instead that the Grand Jury investigate and initiate prosecutions. According to Jefferson:

Grand jurors are the constitutional inquisitors and informers of the country, they are scattered every where, see every thing, see it while they suppose themselves mere private persons, and not with the prejudiced eye of a permanent and systematic spy. Their information is *on oath*, is public, it is in the vicinage of the party charged, and can be at once refuted. These officers taken only occasionally from among the people, are familiar to them, the office respected, and the experience of centuries has shewn [sic] that it is safely entrusted with our character, property and liberty. A grand juror cannot carry on systematic persecution against a neighbor whom he hates, because he is not permanent in the office.<sup>215</sup>

Jefferson sought to adopt state criminal practice for the federal courts. In the states, grand juries investigated alleged criminal acts.<sup>216</sup> From a mix of practical, political, and ideological motives, Jefferson saw no reason for law enforcement to work differently at the federal level.

Faced with a conflict between Hamilton and Jefferson, Washington turned to Attorney General Randolph for a solution. Randolph found a “hair to split” and crafted a compromise.<sup>217</sup> First, he recognized the practicality and benefit of using revenue officials to identify violations.<sup>218</sup> They were on-site at the ports and already identified all vessels entering and leaving the ports. Even if Jefferson’s grand jury idea was adopted, revenue officials would most likely appear as government witnesses. Using them to report violations was not a significant difference. Randolph also understood Jefferson’s fear of giving Hamilton even more power to craft neutrality policy in a pro-British manner. Randolph, therefore, proposed that revenue officials report directly to the United States District Attorney who would decide whether to prosecute the case. Not only did this strike a sort of compromise between Jeffer-

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215. Letter from Thomas Jefferson to Edmund Randolph (May 8, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON 691–92 (John Catanzariti, ed., 1992).

216. RICHARD D. YOUNGER, THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941 38–40 (1963); Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1960).

217. Letter from Thomas Jefferson to James Madison (May 13, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 25–27 (John Catanzariti, ed., 1995).

218. Letter to Thomas Jefferson from Edmund Randolph (May 9, 1793), in 25 THE PAPERS OF THOMAS JEFFERSON 700–702 (John Catanzariti, ed., 1992).



son and Hamilton, but it permitted rapid and local response to neutrality violations. The administration adopted Randolph's solution and the United States District Attorneys became a key piece to the administration's neutrality enforcement strategy.

As the administration discussed enforcement, French privateering activities gave the administration its first case. The *Citizen Genet*, one of the vessels Genet outfitted in Charleston, seized the *William*, a British merchant ship, near the mouth of the Chesapeake.<sup>219</sup> In order to sell the ship for condemnation as a prize, crew from the *Citizen Genet* had to sail the *William* into port for a judicial determination on the seizure's legality.<sup>220</sup> Gideon Henfield, a Revolutionary War privateer who had been confined in a British prison, served as the prize master for the *William*.<sup>221</sup> Even before Henfield arrived in Philadelphia, the administration heard about the seizure. Following repeated cabinet conversations, Randolph and Jefferson sent instructions to the United States District Attorneys. Randolph sent letters to each of them informing them of the proclamation and their role vis-à-vis the Customs Collectors.<sup>222</sup> Jefferson instructed William Rawle to investigate and file charges if warranted.<sup>223</sup> Rawle found evidence convincing him that charges were warranted, and Henfield was taken into custody.<sup>224</sup> To address these charges, the Circuit Court called a special session to meet at the end of July.<sup>225</sup>

When the special session began, selecting and charging the grand jurors was the first order of business. Under the terms of the 1789 Judiciary Act, jury selection occurred according to the same rules as the state in which the federal court sat.<sup>226</sup> In this case, Pennsylvania rules governed, thus giving the U.S. Marshal wide latitude to find eligible grand jurors as Pennsylvania court rules made sheriffs responsible for locating jurors.<sup>227</sup> Once selected, Supreme Court Justice James Wilson delivered the charge.<sup>228</sup> He began by telling them that the session had

219. CASTO, *supra* note 184, at 48–49; Letter to Thomas Jefferson from George Hammond (Jun. 5, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 199–201 (John Catanzariti, ed., 1995).

220. *Id.* at 43–45.

221. *Id.* at 100.

222. Letter to William Channing, in THE NEW YORK PUBLIC LIBRARY DIGITAL COLLECTIONS (1793) [hereinafter Channing].

223. Letter from Thomas Jefferson to William Rawle (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 40–41 (John Catanzariti, ed., 1995). Randolph sent a circular letter to the United States District Attorneys informing them about the need to prosecute neutrality cases. See Channing, *supra* note 222.

224. Henfield's Case, 11 F. Cas. 1099 (D. Pa., 1793); Letter to Thomas Jefferson from Edmond Charles Genet (Jun. 1, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 159 (John Catanzariti, ed., 1995).

225. Minutes, United States Circuit Court for the District of Pennsylvania, Rough Minutes, 1789–1794, RG21: United States District Courts—Eastern District of Pennsylvania, National Archives Records—Philadelphia [hereinafter Circuit Court Minutes]; Henfield's Case, 11 F. Cas. at 1099.

226. Judiciary Act, 1 Stat. 73, § 29.

227. Brent Tarter & Wythe Holt, *The Apparent Political Selection of Federal Grand Juries in Virginia, 1789–1809*, 49 AM. J. LEGAL HIST. 257, 261–62 (2007).

228. Henfield's Case, 11 F. Cas. at 1099.

been called to deal with American citizens who had assisted the French. Wilson then left the door open for other cases. He explained that he would instruct about neutrality and about criminal laws generally, summarizing the nature of the common law. Wilson turned to the relations between states. Here was the basis for criminal jurisdiction. The federal government had an obligation to the warring nations. He told them:

To this universal society it is a duty that each nation should contribute to the welfare, the perfection and the happiness of the others. If so, the first degree of this duty is to do no injury. Among states as well as among men, justice is a sacred law. This sacred law prohibits one state from exciting disturbances in another, from depriving it of its natural advantages, from calumniating its reputation, from seducing its citizens, from debauching the attachment of its allies, from fomenting or encouraging the hatred of its enemies.<sup>229</sup>

Wilson continued, instructing the grand jurors that not only did the government have an obligation externally but that the government, in order to maintain peace, had to prevent its citizens from drawing the nation as a whole into war. He concluded his general legal instructions with this: "That a citizen, who in our state of neutrality, and without the authority of the nation, takes an [sic] hostile part with either of the belligerent powers, violates thereby his duty, and the laws of his country, is a position so plain as to require no proof, and to be scarcely susceptible of a denial."<sup>230</sup>

The grand jurors took Wilson's charge to heart, particularly the part that mentioned participating with either belligerent power. In addition to Henfield, the grand jury returned indictments and presentments against people believed to be aiding both the French and British.<sup>231</sup> William Conolly, John Singletary, and two others named Osborne and Jones were also indicted for serving on the *Citizen Genet*.<sup>232</sup> Louis Crousillat, a French merchant who, just the year before, had taken an oath of allegiance to the United States, was also indicted in connection with the *Citizen Genet*.<sup>233</sup> He allegedly supplied war materials for the vessel when it arrived in Philadelphia. These indictments indicate someone, whether the Customs Collector or William Rawle, acquired significant evidence about the *Citizen Genet*'s activities and the grand jury heard it. In addition to the *Citizen Genet*, the grand jurors heard evidence about another vessel seized by the French, the *Catherine*. This became another significant conflict both within Wash-

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229. *The Trial of Gideon Henfield for Enlisting in a French Privateer*, in 4 AMERICAN STATE TRIALS 615, 620 (John D. Lawson ed., 1915).

230. *Henfield's Case*, 11 F. Cas. at 1099.

231. See Circuit Court Minutes, *supra* note 225.

232. *Id.*

233. Case Files, United States Circuit Court for the District of Pennsylvania, United States v. Crousillat, 1789–1794, RG21: United States District Courts—Eastern District of Pennsylvania, National Archives Records—Philadelphia.

ington's Administration and with French Minister Genet.<sup>234</sup> One outcome of that conflict was the indictment of Peter Barriere.<sup>235</sup> According to the indictment, he supplied the newly renamed vessel, *Le Petite Democrat*, with cannons.<sup>236</sup> Barriere also served as the selling agent for the *William*.<sup>237</sup>

Considering the Administration's instructions and Rawle's Federalist orientation, these indictments are hardly surprising. However, the grand jury did not stop with those supporting the French. William Morgan, William Crammond, and James Campbell each faced charges for supplying the British with war materials.<sup>238</sup> There is some evidence these cases may not have been as thoroughly investigated as the others. Campbell's offense date is listed as April 19.<sup>239</sup> This was three days prior to the Neutrality Proclamation. Morgan, it turned out, was a British citizen.<sup>240</sup> While neither flaw was necessarily fatal as both violated the law of nations, they made the cases more complicated.<sup>241</sup>

The grand jury system gave people the ability to influence prosecutorial decisions. To convict anyone for violating federal law, the government had to present its case to a grand jury.<sup>242</sup> Citizens could appear before the grand jury, deliver complaints to them, and initiate criminal cases.<sup>243</sup> Therefore, to properly enforce neutrality through the courts, the government had to rely on the citizens who served on these juries.

Only Henfield's case went to trial during the special session.<sup>244</sup> This raises the question of why. Henfield's case was the purpose for calling the special session and both sides had time to prepare as

234. THOMAS, *supra* note 182, at 101–02; Letter from Thomas Jefferson to Richard Harrison (June 12, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, May 11–August 31, 1793, 261–63 (John Catanzariti, ed., 1995).

235. Case Files, United States Circuit Court for the District of Pennsylvania, United States v. Barriere, 1789–1794, RG 21: United States District Courts—Eastern District of Pennsylvania, National Archives Records—Philadelphia.

236. Indictment, UNITED STATES v. BARRIERE, CASE FILES, MINUTES AND HABEAS CORPUS AND CRIMINAL CASE FILES FOR THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, 1789–1794 (Washington: National Archives, 1975).

237. Affidavit of Peter Barriere attached to Letter to Thomas Jefferson from Edmond Charles Genet (Jun. 14, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 281–83 (John Catanzariti ed., 1995).

238. See Circuit Court Minutes, *supra* note 225.

239. *Id.*

240. Letter to Thomas Jefferson from George Hammond (Jul. 11, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 469–70 (John Catanzariti ed., 1995).

241. At the time, Vattel was the pre-eminent authority on the Law of Nations (i.e. international law). During the debates on neutrality enforcement, Jefferson, Hamilton, and Randolph, who were all lawyers, made repeated references to Vattel. According to Book II, Section 75 of Vattel, the offended state who has the individual who has committed the crime in custody, may seek redress. In this instance, the British citizens who outfitted privateers were in the United States and therefore subject to punishment. EMMERICH DE VATTEL, 2 THE LAW OF NATIONS § 75 (1760).

242. U.S. CONST. amend. VI.

243. Krent, *supra* note 19, at 293–95.

244. See Circuit Court Minutes, *supra* note 225.

Henfield was arrested near the end of May.<sup>245</sup> While the administration discussed one or two of the other cases, none received the attention and preparation that Henfield's case received. It is also possible that the other cases did not go to trial because time was a factor. The Supreme Court Justices who presided over the circuit court meeting had to ride circuit on a tight schedule. It is possible that they had to move on to the next town and did not have time to hear any other case. However, one would think the other cases would come to trial at a subsequent session. Of the cases, only Barriere's case appears in the subsequent circuit court minutes.<sup>246</sup> When the circuit court reconvened in April 1794, the United States dismissed the case.<sup>247</sup> Of the remaining cases, Morgan's case received the most attention from the administration. Jefferson and British Minister George Hammond discussed the matter and Hammond conducted some independent investigation.<sup>248</sup> Morgan captained the *Jane*, a British merchant ship. Allegations surfaced that Morgan had taken on additional cannons while docked in Philadelphia.<sup>249</sup> Morgan, not surprisingly, denied this, claiming that he was only shipping flour.<sup>250</sup> The surviving court records do not indicate what happened to this case. Most likely, the government dropped the case once it realized Morgan was a British citizen. According to the individual case files for the other cases, several appeared and asserted innocence.<sup>251</sup> As for the other cases, it is most likely that there were presentments from the grand jury. The grand jurors, acting on their own accord, stated their belief that people had committed crimes. Rawle, as the United States District Attorney, had a duty to draft complaints but no duty to proceed further with the cases.<sup>252</sup> Acting in conformity with administration instructions, Rawle only prosecuted Henfield.

Henfield's trial began a week after the grand jury began its session.<sup>253</sup> Like the grand jury, the names of the petit jurors were not recorded in the court minutes.<sup>254</sup> Evidence presentation and argu-

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245. Letter to Thomas Jefferson from Edmond Charles Genet (Jun. 1, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 160–61 (John Catanzariti ed., 1995).

246. See Circuit Court Minutes, *supra* note 225.

247. See *id.*

248. Letter to Thomas Jefferson from George Hammond (Jul. 11, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 469–70 (John Catanzariti ed., 1995).

249. Letter to George Washington from Thomas Mifflin (Jul. 5, 1793), in 13 THE PAPERS OF GEORGE WASHINGTON 178–79 (Christine Sternberg Patrick ed., 2007).

250. Letter to Thomas Jefferson from George Hammond (Jul. 11, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON 469–70 (John Catanzariti ed., 1995).

251. See, e.g., UNITED STATES V. CAMPBELL AND UNITED STATES V. PEROT, CASE FILES, MINUTES AND HABEAS CORPUS AND CRIMINAL CASE FILES FOR THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, 1789–1794 (Washington: National Archives). Interestingly, the cases in which this language appears all involve supplying the British. When those aiding the French are presented in court, they were arraigned with an attorney present.

252. 1 Op. Att'y Gen. 41 (1794); Krent, *supra* note 19, at 294.

253. FED. GAZETTE, Aug. 2, 1793, at 2.

254. See Circuit Court Minutes, *supra* note 225. This omission is curious considering that the minutes list jurors in several other sessions, including a complete list of all of those called for the Whiskey Rebellion cases the next summer.

ment took two days.<sup>255</sup> The jury deliberated over the course of three days and returned a not guilty verdict.<sup>256</sup> The trial itself proved uneventful, as most of the evidence had been presented six weeks prior in a civil case where the *William's* owners attempted to recover the vessel through the civil courts.<sup>257</sup> Henfield's counsel did not dispute the facts but argued no law prohibited Henfield's actions.<sup>258</sup> The three days of deliberations demonstrated that the jury was not unanimous at the start and had to debate the outcome. Ultimately, however, they exonerated Henfield. The people had spoken definitively about the case.

### 3. Recalibrating Administration Policy

Yet, interpreting what the people said proved difficult. The various interpretations reflected the diverse opinions about the case. Genet lauded the acquittal, claiming the people had proclaimed that they were not bound by Washington's Neutrality Proclamation and could aid France as they wished.<sup>259</sup> A story also circulated that Henfield, following the celebrations, joined up with another privateer.<sup>260</sup> Those from the Federalist persuasion discounted the entire proceeding, claiming that the jury was predisposed to acquit Henfield.<sup>261</sup> Randolph perceived the case as a victory for the Neutrality Proclamation. He pointed to Justice Wilson's agreement that breaching the law of nations could incur criminal liability.<sup>262</sup> Randolph also spoke with the jury foreman who reported that the jury doubted the proof presented in the case, most likely due to the fact that Henfield could not have known about the Neutrality Proclamation when he set sail from Charleston aboard the *Citizen Genet*.<sup>263</sup>

Why did the government pursue this case? Most likely, the government used Henfield's case to send a message to other nations and to the American people.<sup>264</sup> William Rawle, the United States District Attorney, served as the government's mouthpiece. First, the prosecution mollified British Minister Hammond who vigorously protested American participation aboard the French privateer. Henfield's prosecution demonstrated American neutrality to the British. Second, the prosecution sent a message to the American people that they should not embark on privateering expeditions. It appears that only two other

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255. *Id.*

256. *Id.*

257. Findlay v. The William, 9 F. Cas. 57 (D. Pa. 1793); see also Affidavits of John Whiteside and James Leggett, FINDLAY v. WILLIAM, CASE FILES, MINUTES AND HABEAS CORPUS AND CRIMINAL CASE FILES FOR THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, 1789–1794 (Washington: National Archives).

258. Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793).

259. AMMON, *supra* note 183, at 71.

260. CASTO, *supra* note 184, at 100.

261. Letter from Alexander Hamilton to George Washington (Aug. 5, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON 194–96 (Harold C. Syrett ed., 1969).

262. CASTO, *supra* note 184, at 99.

263. Letter to George Washington from Edmund Randolph (Aug. 21, 1793), in 13 THE PAPERS OF GEORGE WASHINGTON 524–25 (Christine Sternberg Patrick ed., 2007).

264. CASTO, *supra* note 184, at 93.

Americans were prosecuted for participating in privateering activities. Neither of those cases received attention from the administration. No discussion appears in the surviving correspondence of Washington, Jefferson, Hamilton, or Randolph.

The outcome of Henfield's trial, regardless of interpretation, did not end the government's neutrality enforcement efforts. However, the strategy changed. In the fall, Jefferson sent a circular letter to all United States District Attorneys.<sup>265</sup> While the Customs Collectors continued to observe neutrality violations in the ports, Washington, through Jefferson, instructed the District Attorneys to investigate any seizures made by any privateers within three miles of the United States coast.<sup>266</sup> In one instance, Virginia's United States District Attorney, Alexander Campbell, investigated a prize taken by the privateer, *Republic*.<sup>267</sup> After taking depositions from those involved, Campbell concluded that the seizure occurred outside United States territorial waters, thus making it immune from United States legal action.<sup>268</sup>

Throughout 1793, the administration's neutrality enforcement policy evolved. Beginning with debates about who would investigate and charge, and ending with acquittals and re-direction. From the outset, the administration charted a course largely independent from popular sentiment. The United States District Attorneys, as lawyers for the government, represented the administration's policy, even in the face of acquittals and dismissals. They faithfully received their instructions and executed them when possible. When it came time to choose a case for prosecution, William Rawle selected a case involving an American serving for the French. This selection sent a strong message, a message the administration wanted to send, to the British, to Genet, and, especially, to the American people.

## V. FEDERAL PROSECUTORS AND THE GOVERNMENT'S INTEREST

Despite the rhetoric of courts, commentators, and engravings on buildings, United States Attorneys and their assistants represent the interests of the United States government. Those interests are not necessarily to ensure that justice results. Instead, as the government's early practice demonstrates, federal prosecutors implement and execute national policy,<sup>269</sup> even if individual injustice results, because national interest requires it. Focusing on policy enforcement constrains prosecutorial decision-making and moves power away from the prosecutor, leveling the power imbalance between members of the courtroom workgroup. By limiting prosecutors to the enforcement of national pol-

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265. Letter from Thomas Jefferson to the District Attorneys (Nov. 10, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON 338–40 (John Catanzariti ed., 1997).

266. *Id.*

267. Letter from Henry Lee to Thomas Jefferson (Oct. 4, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON 195–96 (John Catanzariti ed., 1995).

268. *Id.*

269. Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AM. U. L. REV. 310, 314–17 (1978) (describing the difference between policies, guidelines, and directives).

icy, defense counsel, judges, and juries can reclaim the responsibilities their roles require.

Today, we expect prosecutors to “do justice.” This inherently ambiguous term provides prosecutors with little practical guidance. What is just in any particular circumstance? Was it just to prosecute Henfield for serving on the French privateer? To some it certainly was. Those who believed in a strong, centralized government and those who favored the British believed justice was done. They saw the acquittal as unfortunate. For others, however, it was the height of injustice. Most of Philadelphia’s inhabitants believed the prosecution unjust. Henfield was a hero. His acquittal demonstrated the justness of their cause. If the public’s perception of justice was to be the basis for his decision, how could Rawle decide? No matter which action he took someone would perceive it as unjust.

Justice is not solely people’s perceptions. Justice entails accurately determining what happened.<sup>270</sup> Yet, Rawle did not do this in Henfield’s case either. In fact, what occurred was not in question. Everyone agreed Henfield served as prize-master on the privateer. Everyone agreed he sailed the *William* into Philadelphia. Everyone agreed that Americans serving aboard French vessels violated American neutrality. However, was this a violation of criminal law? Was his act punishable as a crime? Reasonable people—e.g. attorneys, Washington’s cabinet, etc.—disagreed about whether Henfield’s conduct was criminal. Apparently, it was not until after the trial that anyone considered that Henfield was at sea when the neutrality proclamation was issued so that it was incredibly unlikely that Henfield knew anything about the neutrality proclamation until he arrived in Philadelphia.

Assuming justice prevailed, did justice prevail because Rawle ensured Henfield received due process?<sup>271</sup> Was the outcome just because Henfield was indicted by a grand jury and subsequently acquitted by a jury drawn from the area? Was it just because he had a team of talented attorneys representing him? If this is so, would it be equally just for Henfield to be convicted instead? The process was the same. As this brief demonstration indicates, justice can be ambiguous and vague.

Rather than use justice as the standard for determining a prosecutor’s actions, the notion that the prosecutor represents the national interest as manifested through policy enforcement serves as a more objective tool. An administration can set policy in advance. For instance, following September 11, the Bush administration announced that national security would be the government’s top priority.<sup>272</sup> As a result, national security prosecutions became the Justice Department’s top priority. During the 1980s, drug cases attracted the department’s

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270. Seth F. Kreimer, *Truth Machines and Consequences: The Light and Dark Sides of ‘Accuracy’ in Criminal Justice*, 60 N.Y.U. ANN. SURV. OF AM. L. 655, 655–57 (2005).

271. See generally, Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC’Y REV. 103 (1988).

272. Dan Balz, *Bush Warns of Casualties of War*, WASH. POST., Sep. 18, 2001, at A1.

attention due to President Reagan's War on Drugs.<sup>273</sup> Whether or not prosecutors enforce policy provides an objective measure. If prosecutors ignore national security matters to deal with non-priority regulatory matters, it might indicate that the prosecutor is not making wise decisions.<sup>274</sup> Perhaps the prosecutor is abusing his or her discretion or pursuing a personal agenda. It also provides a measuring stick for efficient resource utilization. If an administration states national security is a top priority, then it is reasonable to think most prosecutorial resources should go in that direction. If they do not, then it may indicate a problem.

Beyond its use as a tool for commentators and the public, limiting prosecutors to representing the nation's policy goals has certain benefits. First, policy is public. There are no secret agendas and the people are on notice. Second, policies change, thus connecting them to time and situation. Third, policy choices ultimately come from the people and are responsive to the people's wishes. While it is not an immediate reflection, if the policy choice steps too far beyond the public's tolerance, the public will respond.<sup>275</sup> Finally, it provides prosecutors with clear guidance for discretionary decision-making.

Government policies are public. In today's information age, anyone can search any government agency and determine its priorities. The Justice Department, for example, publishes its 2014–18 strategic plan on its website.<sup>276</sup> Its top priority is to prevent terrorism. Following this broad goal, the policy lists several methods to effectuate the policy. After disrupting potential attacks, the policy is to prosecute those involved in terrorist acts, investigate and prosecute espionage activity, and investigate and prosecute cyber-threat actors. This is no different from the Washington administration. Washington's neutrality proclamation in April 1793 announced the government's intention to remain neutral. It also stated that those violating neutrality were subject to prosecution. In both instances, the people can respond to the policy in a variety of ways.<sup>277</sup>

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273. Andrew B. Whitford & Jeff Yates, *Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs*, 65 J. OF POL. 995 (2003) ("present[ing] statistical tests of the managerial power of presidential policy signals in the case of the United States Attorneys' implementation of the federal 'War on Drugs' . . . [P]residential policy signals shifted the composition of the Attorneys' caseload, although not to the exclusion of other pertinent local, national, and internal factors.").

274. Perry, *supra* note 25, at 142–46 (discussing typologies of United States Attorneys and their relationship to the Justice Department).

275. 2 JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 19–21 (2d. ed. 1995) (discussing how problems are defined). The use of enhanced interrogation techniques by the CIA post September 11, 2001 is an example of this. Despite extensive reviews by lawyers in the White House, the Justice Department, and the Central Intelligence Agency, when the program was disclosed, the public outrage and subsequent political fallout led to ending the program; *see also* JOHN RIZZO, *COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA* (2014).

276. U.S. DEP'T OF JUST., *FISCAL YEARS 2014–2018: STRATEGIC PLAN*, <http://www.justice.gov/sites/default/files/jmd/legacy/2014/02/28/doj-fy-2014-2018-strategic-plan.pdf#s4>.

277. These include protests, petitions, and elections.



As circumstances change, policy changes. In 1793, the Washington Administration had to avoid the war between France and Great Britain. Enforcing neutrality policy became a key element of this effort. The European war did not last indefinitely as the French Revolution descended into the Reign of Terror.<sup>278</sup> Within five years, the administration's priorities turned to internal unrest. Beginning with the Whiskey Rebellion in western Pennsylvania and concluding with enforcement of the Alien and Sedition Acts, the government adopted a policy of crushing dissent.<sup>279</sup> Those whom the government oppressed formed an opposition and removed John Adams as President in favor of Thomas Jefferson.<sup>280</sup> With Jefferson's inauguration, Alien and Sedition Act enforcement ended.<sup>281</sup> The September 11, 2001 attacks on the United States represent a similar change. Prior to that day, terrorism was not a significant government priority.<sup>282</sup> However, following the attacks, terrorism became the Department's top priority. Though it has been fourteen years since that day and it remains the nation's top priority, other concerns will eventually take precedence. Even with the focus on national security, other areas have become a priority from time to time. For example, during 2003–04, white collar crime became an important government priority.<sup>283</sup>

Policy ultimately derives from the people. While a government's policy may be criticized and unpopular, even amongst a majority of the population, it still is "by the people" according to representative theory.<sup>284</sup> United States constitutional and republican theory permits the people to express their will through elections.<sup>285</sup> Once elected, representatives act in the national interest, especially those of the Executive Branch. In fact, the President is the only elected official representing the national interest. In law enforcement matters, the President acts through United States Attorneys who represent those interests.<sup>286</sup> The judicial system gives people a voice through service on grand and petit juries, with the latter group passing final judgment on cases presented to them.<sup>287</sup>

278. SCHAMA, *supra* note 148, at 783–85.

279. JOHN CHESTER MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 53-59* (1951) (discussing the motives behind the Sedition Acts); *see also* FRITZ, *supra* note 82, at 169-70 (discussing Washington's opposition to the protests).

280. MILLER, *supra* note 279, at 221–26.

281. JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 303–05* (1956).

282. RIZZO, *supra* note 274, at 137–39 (discussing his perspective on the importance of terrorism to the Clinton administration); *see also* GARRETT M. GRAFF, *THE THREAT MATRIX: THE FBI AT WAR IN THE AGE OF GLOBAL TERROR* (2011) (discussing in Chapter 8, the FBI's work in the years preceding 9/11).

283. *See generally*, Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002–03: On Sideshow Prosecutions, Spitzer's Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443 (2004).

284. *See discussion supra* Section III.A.

285. FRITZ, *supra* note 82, at 7.

286. Prakash, *supra* note 51.

287. NELSON, *supra* note 75, at 3–4.

The problem for present federal criminal justice practice is that jury trials are rare. When they do not occur, the people lose their ability to judge the executive's policy choices. At the time of Henfield's prosecution there were few federal criminal cases. His case went to trial days after indictment. Today, that cannot happen. However, steps can be taken to encourage more criminal trials.

Federal prosecutors spend considerable time investigating cases and collecting evidence to establish strong cases that end with guilty pleas. Armed with a wide variety of vague criminal statutes, federal prosecutors generally select easy cases to prosecute or those with the most symbolic value.<sup>288</sup> Coupled with the potential for long prison sentences, federal defendants plead guilty at a high rate.<sup>289</sup> Even in cases where the evidence is not as strong, federal prosecutors persuade defendants to enter guilty pleas in exchange for a reduced sentence or to gain cooperation in other cases.<sup>290</sup>

The power to avoid trials derives from prosecutorial discretion. Prosecutors, especially federal prosecutors, have virtually unreviewable discretion.<sup>291</sup> With little public oversight and no judicial oversight, prosecutors choose their cases with minimal guidance. Commentators have posed a variety of solutions to this problem. Some have connected prosecutorial discretion to ethical guidelines for attorneys generally.<sup>292</sup> This has not worked as well as hoped because, without a human client, there is no one to file an ethics complaint. While defense attorneys and judges could file an ethics complaint, the harm it could cause the courtroom workgroup's functioning makes filing unlikely.<sup>293</sup> Others have argued for judicial control. This has failed to gain traction as judges use the separation of powers doctrine to justify not exerting control.<sup>294</sup> Of course, this has not kept judges from writing highly critical opinions

288. Oesterle, *supra* note 283, at 449–51.

289. See *Federal Judicial Caseload Statistics 2014 Tables*, UNITED STATES COURTS, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014-tables> (stating that according to the U.S. Courts federal district court statistics for the 12-month period between April 1, 2013 and March 31, 2014, there were 89,403 criminal defendants and that of those defendants, 82,084 were convicted and sentenced, 80,111 of which were the result of guilty pleas).

290. Jeffery T. Ulmer, James Eisenstein & Brian D. Johnson, *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560 (2010).

291. Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669 (1992); Perry, *supra* note 25; Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569 (2010); Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187 (2008).

292. See generally Green, *supra* note 20.

293. Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275 (2007).

294. Robert Heller, Note, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997); see also *United States v. Armstrong*, 517 U.S. 456 (1996) (setting the standard for judicial review of selective prosecution claims); *Wade v. United States*, 504 U.S. 181 (1992) (setting the standard for judicial review of substantial assistance departures); *Wayte v. United States*, 470 U.S. 598 (1985) (asserting that the Attorney General and United States Attorneys maintain broad discretion to enforce the nation's criminal laws).

about prosecutorial conduct.<sup>295</sup> Within the federal context, commentators debate the amount of control the Justice Department should have over prosecutorial decision-making.<sup>296</sup> In the state system, commentators have proposed tying budgets to the number of people incarcerated such that prosecutors pay for those they imprison.<sup>297</sup> Others have supported giving victims more power to initiate cases.<sup>298</sup> Suffice to say, none of these have empirically reduced prosecutorial misconduct or perceptions of injustice.

The most common approach to controlling prosecutorial discretion has been policy, specifically internal prosecutorial policy.<sup>299</sup> This approach also resulted in practical application as many prosecutor offices created specialized units.<sup>300</sup> These specialized units implement charging policies to improve prosecutorial efficiency. For example, domestic violence units adopted victimless prosecution policies, although with mixed results.<sup>301</sup> The federal government also implements internal policies. For instance, a United States Attorney's Office must have approval from the Justice Department prior to proceeding in international terrorism matters.<sup>302</sup>

While policy has provided guidance to prosecutorial discretion, it may be trumped by the obligation to do justice. Blindly following policy can lead to injustice.<sup>303</sup> Commentators and courts expect prosecutors to be conscious of this. Suppose prosecutors did not place justice

295. See, e.g., *United States v. Olsen*, 737 F.3d 625 (9th Cir. 2013) (Kozinski, J., dissenting); *United States v. Stevens*, 715 F. Supp. 2d 1 (D.D.C. 2009).

296. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 523–30 (2011) (describing the federalism debate in criminal law).

297. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996).

298. Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J. L. & PUB. POL'Y 357 (1986).

299. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2009) (discussing the internal regulation of prosecutors); Leonard R. Mellon, Joan E. Jacoby & Marion A. Brewer, *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52 (1981) (finding that policy influences prosecutorial decision-making).

300. Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461 (2005); David C. Pyrooz, Scott E. Wolfe & Cassia Spohn, *Gang-Related Homicide Charging Decisions: The Implementation of a Specialized Prosecution Unit in Los Angeles*, 22 CRIM. JUST. POL'Y REV. 3 (2011).

301. Andrea J. Nichols, *No-Drop Prosecution in Domestic Violence Cases: Survivor-Defined and Social Change Approaches to Victim Advocacy*, 29 J. INTERPERSONAL VIOLENCE 2114 (2014) (describing non-drop policies of domestic violence units and discussing the differing perspectives on no-drop policies); see also John L. Worrall, Jay W. Ross & Eric S. McCord, *Modeling Prosecutors' Charging Decisions in Domestic Violence Cases*, 52 CRIME & DELINQ. 472 (2006).

302. U.S. ATTORNEYS' MANUAL § 9-2.136.

303. See Beale, *supra* note 96 (stating that the firings of several United States Attorneys in 2006 provide a good example and were allegedly fired because they refused to prosecute specific public corruption cases targeting Democrats, specifically, policy dictated that they prosecute but, in their minds, justice required otherwise).

above policy adherence. What would this look like, particularly in the context of federal prosecutions?

Without the obligation to do justice, federal prosecutors would focus the bulk of their resources on categories of crimes relevant not only nationally but also locally. Today's prosecutors, whether federal or state, work closely with their respective communities.<sup>304</sup> One key aspect of community work involves identifying the community's concerns. Once identified, prosecutors address these community problems. This translates into a focus on crime categories. Some communities might have a burglary problem. Prosecutors would respond by increasing burglary prosecutions. On the federal level, there might be a public housing problem. Federal prosecutors could investigate criminal violations relating to housing management. Similarly, investigatory agencies might attempt to address problems. For example, the Department of the Interior's Fish and Wildlife Service might focus upon illegal ginseng transactions.<sup>305</sup> No matter the focus, however, prosecutors must select their cases with set financial and personnel resources. The various United States Attorney offices only have so much money to spend on prosecutorial salaries.

Without the burden of guaranteeing accuracy, prosecutors will focus more attention on policy enforcement by taking on borderline cases in priority areas.<sup>306</sup> While some might argue prosecutors should not take on such cases, these cases will most likely go to trial. When cases go to trial, the public can voice its opinion about the policy choice. The good cases will still be pleaded; the bad cases will not be filed. As prosecutors scrutinize public response, marginal cases constrain and guide prosecutorial decision-making.

The key to marginal cases is reviewing outcomes. Following Henfield's acquittal, the Washington administration altered its policy by shifting attention from enforcing neutrality against Americans to preventing the arming of privateers in sea ports. Christopher Gore, Massachusetts United States District Attorney, spent considerable effort attempting to convict the French consul in Boston of arming privateers without success.<sup>307</sup> The Philadelphia grand jury indictments focused on arming privateers and the one case followed up on by the govern-

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304. Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 L. & SOC. INQUIRY 239 (2005); see also Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465 (2002); Melanie D. Wilson, *Anti-Justice*, 81 TENN. L. REV. 699 (2014).

305. See, e.g., Press Release, USAO, W.D.N.C., Ginseng Root Poacher Sentenced to Jail Time (Aug. 28, 2014), <http://www.justice.gov/usao-wdnc/pr/ginseng-root-poacher-sentenced-jail-time>.

306. For a study on how prosecutors handle marginal cases, see Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 (2002).

307. Letter from Thomas Jefferson to Christopher Gore (September 2, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, Sept. 1–Dec. 31, 1793, 13–14 (John Catanzariti ed., 1997); see also Letter from Thomas Jefferson to George Washington, Cabinet Opinions on the *Roland* and Relations with Great Britain, France, and the Creeks (August 31, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, May 11–Aug. 31, 1793, 795–98 (John Catanzariti ed., 1995).

ment was for arming French privateers.<sup>308</sup> The French were not the only government target however. Virginia's United States District Attorney Alexander Campbell investigated a British seizure, ultimately finding that it took place outside United States jurisdiction.<sup>309</sup>

The policy change likely resulted from one of two reasons, both supporting the idea that prosecutors should prosecute marginal cases and review the outcomes. First, it is possible that there were no more Americans engaging in privateering activities. Word of America's neutrality spread slowly, but with the notoriety achieved by Henfield's case, the administration sent a strong message to its citizens that serious consequences would ensue if they participated beyond supplying goods.<sup>310</sup> Second, the verdict may have caused the administration to shy away from these cases. In addition to Henfield's acquittal, two similar criminal cases occurred at the same time. One prosecution in North Carolina was discontinued.<sup>311</sup> The other, in Georgia, resulted in an acquittal.<sup>312</sup> The public spoke clearly that they would not convict in these cases.

Reviewing outcomes is essential for the public to communicate its opinion on specific policy choices. Suppose the government begins prosecuting unlawful transactions in ginseng but, due to the nature of the cases, has difficulty procuring strong evidence. Despite the weak cases, the government decides to proceed with several cases to send a message. It might find that the jury acquits. Federal prosecutors should then realize the American people prefer to have resources devoted to other crime areas. At the same time, the administration still sends a message to the people that ginseng is an important natural resource requiring protection.

Presidential administrations that do not heed the people's voice in criminal law enforcement may find themselves replaced. Though heavily criticized, Washington's Vice President succeeded Washington as President. Washington carefully made his policy choices. The Adams administration, however, did not heed the public's voice but suppressed it through vigorous sedition prosecutions. Confronted with mounting criticism from the Republican faction, Adams and Secretary of State Timothy Pickering went to great lengths to prosecute offenders.<sup>313</sup> They went so far as to use liberal jury selection methods to create juries

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308. Letter from Christopher Gore to Thomas Jefferson (October 21, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, Sept. 1–Dec. 31, 1793, 261 (John Catanzariti ed., 1997).

309. Letter from Henry Lee to Thomas Jefferson (October 4, 1793), in 27 THE PAPERS OF THOMAS JEFFERSON, Sept. 1–Dec. 31, 1793, 195–96 (John Catanzariti ed., 1997).

310. Letter from Thomas Jefferson to Jean Baptiste Ternant (May 15, 1793), in 26 THE PAPERS OF THOMAS JEFFERSON, May 11–Aug. 31, 1793, 42–44 (John Catanzariti ed., 1995). This correspondence, and a similar one to British Minister Hammond, became the official statement of how the Washington administration viewed its neutrality responsibilities. See *supra* note 1.

311. CASTO, *supra* note 184, at 100.

312. *Id.* at 100–01.

313. SMITH, *supra* note 281, at 182–87.

prepared to convict. The failure to heed the public's voice aided Thomas Jefferson's election.

One potential objection to disconnecting criminal prosecutors from the obligation to pursue justice is the potential for wrongful convictions. One could argue that the ethical responsibility to do justice prevents prosecutors from indiscriminate use of their power. However, even with the obligation in place, there is widespread misconduct and hundreds of wrongful convictions.<sup>314</sup> It is not likely to get worse by disconnecting prosecutors and justice. The effect the disconnection will have is that it will place more pressure on judges and defense attorneys. They must thoroughly scrutinize cases, especially marginal ones. Currently, there is little incentive to thoroughly scrutinize prosecutorial actions because defense attorneys and judges rely upon the prosecutors' duty to do justice, which is interpreted as being accurate.<sup>315</sup> In terms of accuracy, few if any prosecutors want to falsely convict someone, even without the ethical duty to do justice.

## VI. CONCLUSION

Today's prosecutors have tremendous power through their daily discretionary decisions. Sometimes they abuse this power. After examining numerous causes for such abuse, suggestions have been made to reduce discretion. Even with implementing some proposals, prosecutors, and federal prosecutors in particular, still utilize broad statutory crimes coupled with broad discretion. How can such discretion be constrained?

This Article draws upon the origins of federal criminal prosecution to argue that federal prosecutors represent the government's policy position, even if the public objects. The Washington administration faced significant public criticism for its neutrality policy. Despite this, it recognized the policy's national importance. Had it failed to vigorously enforce neutrality, European nations may not have believed the United States was neutral and the United States could have been drawn into war. While many perceived the administration's actions as unjust, the government persisted, taking one case to trial. While the facts were not contested, Henfield's guilt was debated. Ultimately, as a republic, the people's voice prevailed. They spoke through juries.

Today, especially in the federal system, the people rarely have an opportunity to speak. Even when cases go to trial, they are cases where the defendant has nothing to lose by going to trial. Marginal cases are disfavored. This needs to be reversed. Prosecutors need to take more marginal cases into court so the public can speak. By detaching prosecutors from the obligation to do justice and giving clear policy guidance, prosecutors will devote their resources to a specific category of cases and present marginal cases. Juries will hear these cases and use

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314. See Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 8–10 (2009).

315. Green, *supra* note 20, at 637–42 (examining prosecutorial responsibility to find the truth in a wrongful conviction case).

their collective voice to pass judgment on the policy. By reviewing outcomes, governments and prosecutors can adjust their policy appropriately.

Ultimately, prosecutors represent the government that hired them, just like any other attorney. When the client gives direction to the attorney, the attorney counsels the client on the outcome or consequences but ultimately follows directions within ethical bounds. Prosecutors should act the same way. The people selected the government policymakers. Prosecutors should follow government law enforcement policies, even if potential injustice results. In this way, prosecutors ultimately represent all of the people.